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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-928

JUDITH LOPP (DUNCAN), *Petitioner,*

vs.

JAMES D. LOPP, JR., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

JUDITH LOPP (DUNCAN), *Petitioner,*

vs.

JAMES D. LOPP, JR., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner, Judith Lopp (Duncan), respectfully prays that a writ issue to review the judgment and opinion of the Supreme Court of Indiana entered in these proceedings.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported at _____ Ind. ____, 378 N.E. 2d 414 (1978), and appears in Appendix to this Petition. The opinion of the Indiana Court of Appeals is reported at _____ Ind. App. _____, 370 N.E. 2d 977 (1977), and appears in Appendix to this Petition.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on July 20, 1978. Petitioner filed a timely Petition for Rehearing, which was overruled on September 18, 1978. This petition for a writ of certiorari was filed within ninety (90) days of the Indiana Supreme Court's order denying the Petition for Rehearing. The Supreme Court of Indiana is the highest court in Indiana having jurisdiction to review lower state court decisions. This Court's jurisdiction is invoked under 18 U.S.C. 1257 (3).

STATUTES INVOLVED

Portions of the Omnibus Crime Control and Safe Streets Act of 1978, specifically 18 U.S.C. §§2510, 2511 and 2515 are reprinted in Appendix A to this petition. These sections of title 18 of the United States Code are sometimes referred to in the lower courts' opinions and in this petition as the Federal Wiretap Statute or the Act. 18 U.S.C. §2515 provides:

§2515 PROHIBITION OF USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agent, regulatory body legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be a violation of this chapter.

QUESTION PRESENTED

Does the Ominbus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. §2515, bar the use of tape recorded conversations between a wife and an unrelated third person as evidence in a divorce proceeding where the husband obtains the tapes prior to filing a divorce petition by using a tape recorder furnished by a private detective and with the advice and instruction of the detective records the conversations by attaching a self-activating tape recorder to the telephone line located in the marital home.

STATEMENT OF THE CASE

On September 23, 1975, the respondent, James D. Lopp, Jr., an attorney, filed a petition for dissolution of his marriage to petitioner, Judith Lopp (Duncan). On the same day, the petitioner went to the law office of her husband. Her father-in-law, James D. Lopp, also an attorney, informed her that if she did not consent to temporary custody of the parties' minor child, James D. Lopp, III, with her husband, various taped phone conversations would be published to other persons including the petitioner's former husband. The tapes were obtained when respondent, under the direction of Rip Kirby, a private investigator, placed a recording device on the telephone located in the marital residence. The recordings were made on September 20, 1975, on a tape recorder owned by Rip Kirby, president of Ira Clark Detective Agency in Evansville, Indiana.

On September 23, 1975, the petitioner, without counsel, signed an agreed entry giving respondent custody of the parties' child during the pendency of the action. On September 30, 1975, petitioner, against her first attorney's advice, signed a second agreed order which also provided respondent with temporary custody of the parties' child.

On October 3, 1975, petitioner filed a petition for rehearing on the issue of temporary custody. Petitioner alleged that the first two orders were obtained under coercion when respondent and her father-in-law, both attorneys, threatened her with publication of various tape recordings.

On November 25, 1975, a hearing was held on petitioner's motion to set aside the prior orders and on various other pending motions. At the hearing, the respondent-husband

offerred into evidence the tape recorded conversations. (See Transcript of the Evidence p. 471.) (Reference to the Transcript of the Evidence is abbreviated as TR. in this petition.) Petitioner objected to the introduction of the tapes into evidence based on the bar of such evidence found in the Federal Wiretap Statute, specifically 18 U.S.C. §2510 *et. seq.* (The full text of the objection and ruling appears in Appendix E to this petition.) The trial court overruled the objection and admitted the tapes into evidence.

After taking under advisement the motion to set aside the agreed orders, the trial court overruled the motion on December 3, 1975.

The final hearing on the dissolution petition was held on December 10, 1975. On December 11, 1975, the respondent was called as a witness during the presentation of his evidence-in-chief on his petition for dissolution of the marriage. On direct examination, the wiretapped telephone conversations were again offered into evidence by respondent as his exhibit number 8. (TR. p. 674.) Petitioner objected to the admission of the tapes into evidence. Preliminary cross-examination by petitioner's counsel prior to the introduction of the tapes established that respondent did not meet any of the qualifications under §2511 which contains various detailed exceptions to the wiretap statute's general rule that the act of obtaining wiretaps of another's conversations is unlawful. (TR. pp. 675-678.) (The entire objection based on 18 U.S.C. §2515 at the final hearing appears in Appendix F of this petition.) The petitioner's objection was overruled and the tapes were admitted as substantive evidence during the respondent's case-in-chief on his petition for dissolution of marriage.

On December 22, 1975, the trial court entered its judgment granting the respondent's petition for dissolution. The court's judgment also awarded permanent custody of the parties' minor child, James Lopp, III, to the respondent and made various divisions of the marital property.

Under Rule 59 of the Indiana Rules of Appellate Procedure, a party has sixty (60) days from the entry of judgment to file a motion to correct errors. On February 20, 1976, petitioner filed her motion to correct errors which contained as specification number 9 the claim that the admission of the tapes into evidence at the provisional hearing and at the final hearing was erroneous and barred by 18 U.S.C. §2515. (TR. p. 1.) A transcript of both objections was included in the memorandum of facts and grounds in support of the motion to correct errors.

On March 3, 1976, the trial court overruled the petitioner's motion to correct errors; and petitioner timely perfected her appeal to the Indiana Court of Appeals, First District.

After extensive briefing by both parties, the Indiana Court of Appeals entered its decision on December 28, 1977. The Court of Appeals reversed and remanded the case to the Vanderburgh Superior Court. The essence of the Court of Appeals' decision was that the introduction of the tapes in evidence was barred by 18 U.S.C. §2515. (The opinion appears in full in Appendix B to this petition.)

On January 13, 1978, respondent filed a timely motion for rehearing in the Indiana Court of Appeals. The motion was denied February 6, 1978. On February 21, 1978, respondent filed a timely Petition to Transfer the appeal to the Supreme Court of Indiana.

On July 20, 1978, the Supreme Court of Indiana granted transfer (review) of the appeal and vacated the Indiana Court of Appeal's decision and affirmed the decision of the trial court, holding that the admission of the wiretapped evidence did not violate 18 U.S.C. §2510 *et. seq.* (The opinion appears in Appendix C to this petition.)

On August 7, 1978, petitioner filed her timely motion for rehearing before the Supreme Court of Indiana. The motion for rehearing was denied on September 18, 1978.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE 18 U.S.C. §2515

The language of Section 2515 could not be clearer. No

part of communications intercepted in violation of the statute "may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority of the United States, a state or a political subdivision thereof . . ."

A review of the preliminary and foundation testimony of the respondent prior to the introduction of the tapes into evidence (see Appendix E and F) establishes that the exceptions to violation of the Act contained in Section 2511 were not available under the facts and circumstances of respondent's method and act of intercepting the wife's conversations. Indeed, the respondent admitted in his statement of the facts presented in his Appellee's brief before the Indiana Court of Appeals that he attached an electronic recording device to his telephone and recorded incoming conversations. The husband also admitted that at no time did he obtain the consent of either his wife or any other party to the telephone conversations.

As the Indiana Court of Appeals discussed in its opinion, Section 2515 is clear and unequivocal. The term "any person" means exactly what it means in everyday English usage. Any person, including a spouse, may not secretly place wiretap equipment on a telephone within the marital home and then claim an exemption from the statute. As the Indiana Court of Appeals noted, the United States Congress explicitly detailed the exemptions from the coverage of the Act; "interspousal" wiretaps were not exempted. It is difficult to imagine what more Congress could have done to satisfy the respondent's contention that the term "any person" does not apply to him.

The Indiana Court of Appeals discussed the legislative history of the Wiretap Statute and concluded that Congress was aware of the misuse of electronic surveillance equipment in marital disputes and intended to reach such abuses with the wiretap statute. [See Appendix B and discussion of legislative history in *U.S. v. Jones*, 542 F. 2d 661 (6th Cir. 1976). *See also* Senate Report No. 1097 (1968 U.S. Cong. and Ad. News at 2112) which provides that any person is, with the exception of governmental entities, to be given a comprehensive definition in interpreting the wiretap statute (1968 U.S. Cong. and Ad. News at 2179)].

There can be little doubt that Section 2515 applies to the trial court proceedings. The Vanderburgh Superior Court is a court of general jurisdiction under Indiana law. Section 2515 mandates that whenever any wire communication has been intercepted in violation of the statute (Section 2511 as previously discussed), no part of the contents of the communication and no evidence derived from the communication may be received in *any trial, hearing* or other proceedings in or before *any court*. The tapes were first introduced at a *hearing* to set aside the Provisional Order. The tapes were again admitted into evidence during the husband's case-in-chief at the final *hearing* on the petition for dissolution of marriage. In both instances, the tapes were admitted over the specific objection of the petitioner based on the federal wiretap statute.

All the factors necessary to require exclusion of the tapes were thus before the trial court. The oral or wire communication was intercepted by the respondent who was not excluded from the Act under Section 2511. The act of intercepting the wife's communication was proscribed by the act and the use of the tapes of the conversations in the hearings before the Vanderburgh Superior Court was barred by Section 2515. Under the unambiguous language of Section 2515 and *Gelbard v. U. S.*, 408 U.S. 41 (1972), the trial court committed error in admitting the tapes into evidence.

The wiretap statute was designed to preserve the right of privacy; and the right of privacy is an illusion without substance if the failure to exclude illegally obtained evidence by an attorney used against his wife in divorce proceedings is not condemend by this Court.

Counsel for the petitioner has found only two other reported decisions dealing with the exclusionary rule in Section 2515 applied to divorce proceedings. Understandably, the decisions do not involve the federal court system as divorce actions are a matter of state law. Section II of this Brief deals with the diverse opinions rendered by federal courts in civil and criminal proceedings brought as a result of a violation of the wiretap statute during various domestic crises or proceedings.

In *Rickenbaker v. Rickenbaker,* 290 N.C. 373, 326 S.E. 2d 347 (1976), the Supreme Court of North Carolina held that the trial court properly excluded from evidence tapes obtained by a husband's interception of his wife's telephone conversations. The court held that the interception by the husband violated the federal wiretap statute.

In *Beaber v. Beaber,* 41 Ohio Misc. 95, 322 N.E. 2d 910 (trial court reported decision 1974), *aff'd* unreported Appeal No. 1487, Aug. 4, 1975, Ohio App. 5th Dist., the appellate court affirmed a trial court's admission of wiretap evidence for *impeachment* of the wife's testimony. In contrast, the present appeal does not present any question of the use of illegally obtained evidence for impeachment, rather the tapes in the present appeal were introduced by the husband in both instances in his case-in-chief.

In a related question, the court in *Markham v. Markham,* 265 So. 2d 59 (Fl. App. 1972), *aff'd* 272 So. 2d 813 (1973), announced that under the Florida Constitution and a Florida wiretap statute, a wiretap placed by the husband on the wife's phone was illegal. The majority in *Markham* stated that a husband has no more right to tap a telephone located in the marital home than a wife has the right to tap a telephone in a husband's office. The *Markham* court did not discuss or rely on the federal statute; the decision is cited to support the natural and statutory rights of either spouse to privacy.

Various federal courts have dealt with the application of criminal and civil (Section 2520) remedies for wiretap violations incidental to divorce proceedings. In *U.S. v. Jones,* 542 F. 2d 661 (6th Cir. 1976), the court held that the district court erred in dismissing an indictment based on 18 U.S.C. 2511 (a) and (d). The husband had placed a wiretap on the wife's phone; the husband and wife were not living together in a "marital home" at the time of the interception. In rendering its decision, the court observed:

> The explicit language of 18 U.S.C. §2511 (1) (a) is that "any person" who violates the section is liable . . . If Congress had intended to create another exception to Title III's blanket prohibition of unauthorized wiretaps, they would have included a specific exception for interspousal wiretaps in the statute.
>
> 542 F. 2d at 671

The *Jones* court added:

> It is not for this court to question the wisdom of Congress and to establish an implied exception to a federal statute by judicial fiat. Only Congress has authority to amend 18 U.S.C. §2511 . . .
>
> 542 F. 2d at 673

The *Jones* court specifically rejected the *implied* exception recognized by Judge Bell in his opinion in *Simpson v. Simpson,* 490 F. 2d 803 (5th Cir. 1974). The *Simpson* court held that a wife cannot bring a civil suit under Section 2520 for the interception of telephone conversations by the husband. The court created an "implied exception" in the statute and concluded:

> As should be obvious from the foregoing, we are not without doubts about our decision. However, we have concluded that the statute is not sufficiently definite and specific to create a federal cause of action for the redress of appellant's grievances against her former husband. Our decision is, of course, limited to the specific facts of this case.
>
> 490 F. 2d at 810

The *Jones* court obviously felt more secure in its reasoning when it stated:

> The language of § 2511 (1) (a) quite clearly expresses a blanket prohibition of all electronic surveillance except under circumstances specifically enumerated in the statute . . . The natural presumption when construing

a statute is that Congress meant what it said.

542 F. 2d at 667

The petitioner can only add that she also believes Congress meant what it said, and the wiretap evidence was not admissible in the present case. Both the trial court and the Indiana Supreme Court ignored the unambiguous language of the exclusionary rule contained in Section 2515 and improperly engrafted an implied exception on their version of the federal statute. The resulting gross injustice to the petitioner can only be corrected by granting the petition for Writ of Certiorari to review the opinion and judgment of the Supreme Court of Indiana.

II.

THE DECISION BELOW AND THE OPINIONS OF VARIOUS FEDERAL CIRCUIT COURTS OF APPEAL ARE IN CONFLICT ON THE CORRECT INTERPRETATION OF 18 U.S.C. §2510 et. seq. TO "INTERSPOUSAL" WIRETAP

The decision below conflicts with various circuit court opinions, and the various circuit court opinions are in conflict on the application of 18 U.S.C. §2510 *et. seq.* to interspousal wiretaps. The decision below is in direct conflict with the *Rickenbaker, supra,* decision regarding the application of the exclusionary (Section 2515) rule to divorce proceedings. *Rickenbaker,* as previously discussed, is an opinion by the Supreme Court of North Carolina.

On the federal level, the various circuits are in conflict over application of the statute. In *U.S. v. Jones, supra,* the Eighth Circuit Court of Appeals held that the district court improperly dismissed an indictment which charged a husband with violating Section 2511 by intercepting a telephone conversation of his wife and another party. In *Simpson v. Simpson, supra,* the Fifth Circuit Court of Appeals in an opinion by Judge Bell held that the civil remedy provided in Section 2520 did not extend to a wife whose telephone was tapped by her

husband. The *Simpson* rationale creating an implied exemption to *civil* liability was followed by the Second Circuit Court of Appeals in *London v. London,* 420 F. Supp. 944 (S.D.N.Y. 1976) *aff'd sub non. Anonymous v. Anonymous* 558 F. 2d 667 (2nd Cir. 1977). In *White v. Weiss,* 535 F. 2d 1067 (8th Cir. 1976) the Eighth Circuit Court of Appeals held that a husband could maintain a civil action under Section 2520 against a private detective who instructed the wife and supervised her installation of a wiretap on the parties' telephone. (In a companion case, the Nebraska Supreme Court in *White v. Longo,* 190 Neb. 703, 212 N.W. 2d 84 (1973), set aside a conviction for criminal conversion due to the erroneous admission of the recorded telephone conversations into evidence. The opinion was based on the error in not applying the exclusionary rule provided in Section 2515). More recently in *U.S. v. Rizzo,* ____F. 2d _____(7th Cir. 1978) (Appeal No. 77-1841 decided September 1, 1978), the Seventh Circuit Court of Appeals affirmed a conviction of a private investigator under Section 2511 (1) where the private investigator as charged in the indictment either installed or instructed the wife on the installation of a recording device on the telephone located in the marital home. The Seventh Circuit attempted to distinguish *Simpson, supra,* on the basis of a "third party intrusion into the marital home". The Seventh Circuit indicated that the *Simpson* opinion indicated a different view would be taken of third party intrusions. (*See* p. 4 of *Rizzo* slip opinion.) The *Jones* court found this point:

> a classic "distinction without a difference." For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse's employ.
>
> 542 F. 2d at 670.

From a review of these federal decisions, it is apparent that there is little if any harmony among the circuits on the question of the application of the federal wiretap statute to interspousal wiretaps. In addition, the Indiana Supreme Court's

opinion in the present case conflicts with the *Rickenbaker* decision and the rules announced in various circuit court opinions as briefly analyzed in this petition. It is respectfully submitted that it is now appropriate for this Court to formulate a rule for all courts to follow in applying the federal wiretap statute to interspousal wiretaps.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX

APPENDIX A

18 U.S.C. §2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who ---

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when ---

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception

of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given

prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

18 U.S.C. §2510. Definitions

As used in this chapter ---

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the

point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than ---

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning

the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means ---

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. §2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

APPENDIX B

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

IN RE THE MARRIAGE OF	)	
JUDITH GAYLE LOPP,	)	
	)	
Respondent-Appellant,	)	
	)	
and	)	NO. 1-676-A-89
	)	
JAMES D. LOPP, JR.,	)	
	)	
Petitioner-Appellee.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Lester Nixon, Special Judge

LYBROOK, J.

Respondent-appellant, Judith Gayle Lopp, appeals from a judgment by the court determining that the marriage of James Daniel Lopp, Jr. (Husband) and Judith Gayle Lopp (Wife) is dissolved and that husband shall have custody of the one child born from the marriage, James Daniel Lopp, III. Appellant-wife presents the following issues for our review:

> (1) Whether the court abused its discretion and committed reversible error by admitting into evidence a tape recording of conversations obtained by a wiretap installed by husband-appellee?

> (2) Whether the court committed reversible error by admitting into evidence a deposition taken by appellee where appellant allegedly had no notice nor was afforded the right to cross-examine defendant?
>
> (3) Whether the court erred in overruling appellant's motion to rescind the agreed provisional order?
>
> (4) Whether the court abused its discretion in granting appellee-husband temporary and permanent custody of the parties' minor child?
>
> (5) Whether the court abused its discretion in its allegedly disproportionate division of the parties' property and denying appellant attorney fees and cost for appeal?

The facts most relevant to these issues reveal that appellant-wife and appellee-husband, an attorney, were married on January 9, 1971. The couple became involved in a domestic crisis and they separated on September 22, 1975. They have not cohabited since their separation. Wife and Husband had one child, James Lopp, III. Wife had custody of her two children from a previous marriage.

On the day of their separation, September 22, 1975, Husband confronted Wife with tape recordings of telephone conversations allegedly between Wife and various other parties. Husband took physical custody of the couple's child on this date, and moved out of the residence of the parties.

The following day Wife went to her husband's law office. Her husband's father, also an attorney, informed her that if she did not consent to give her husband temporary custody of their child until this conflict was resolved, he would phone her former husband, inform him of the tapes and their contents, and she could possibly lose custody of all three of her children.

Thereafter she signed an agreed provisional order that

reads in part as follows:

"Comes now the Husband in the above matter and files his petition for custody of parties' minor child, and comes now the Wife and the parties agree as follows:

1. That the Husband shall have the care, custody and control of the parties' minor child, James Daniel Lopp, III, provided, however, the Wife shall have the temporary custody of said child at reasonable times.

And the Court now approves the agreement of the parties and the same is now so ORDERED.

* * *

I have read the above order and being advised of my rights to an attorney, freely and voluntarily consent and approve said order.

/s/ Judy Lopp
Wife"

On September 29, 1975, after Wife talked to an attorney, a petition was filed which asked for temporary custody of the parties' child, adequate support, possession of the parties' home, and an order restraining Husband from interfering with her quiet enjoyment of the home.

On September 30, 1975, after a meeting between Wife, Husband, his father and her attorney, the court approved the following order and certified it into the record:

"Comes now the husband and by his attorney, Glenn A. Grampp, and comes now the wife by her attorney, David Kelley, and the wife's petition coming on for hearing, the parties agree as follows:

1. That the husband shall have the care, custody and control of the parties' minor child, James Daniel Lopp, III, provided however, the wife shall have the privilege of seeing and visiting the parties' minor child, one day a week from 9:00 a.m. to 5:00 p.m.

2. That the husband shall pay to the wife, the sum of seventy-five dollars ($75.00) each week for her support and maintenance pending this matter, first payment to be made Friday of this week, October 3, 1975 and a like sum each Friday thereafter pending this matter.

3. That the wife shall have the privilege of occupying the residence pending this matter and that the husband shall pay the utilities as they become due and payable, local telephone calls only.

4. That the wife is restrained from removing any property from the residence.

5. That the husband is to have reasonable access to the house for the purpose of inspection and the wife is to provide the husband with a house key.

6. That the wife is to have the use and possession of a certain Ford Station Wagon.

7. That the wife shall not incur or create any debts chargeable to the husband including but not limited to charge or credit accounts for her own person or any other person.

8. That the husband should pay the wife's attorney, David Kelley, the sum of three hundred dollars ($300.00), one-half of said sum to be paid within thirty (30) days from the date of this order and the balance to be paid within sixty (60) days from

the date of this order.

9. That this Court shall retain jurisdiction of this cause, subject matter and persons herein.

This agreement is entered into freely and voluntarily without coercion or duress and with the wife being advised by her attorney, and having full knowledge of all the facts.

And the court now approves the agreement of the parties and the same is now so ordered."

* * *

The evidence at trial reveals that Husband attached a self-activating tape recorder to his home phone on September 20, 1975, and thus recorded all telephone conversations. The evidence at trial further reveals certain events that Judge Lowdermilk of this court described in the case *In Re The Marriage of Judith Gayle (Forman) Lopp, Appellant and James F. Forman, Appellee* (1977), ____ Ind. App. ____, 362 N.E. 2d 492.

On December 22, 1975, the court issued its judgment and findings for Husband on his Petition for Dissolution and denied Wife's Cross-Petition for Dissolution of Marriage. The court gave custody of James Lopp, III, to Husband. From this determination, Wife appeals.

I.

The first issue for our consideration is whether the court abused its discretion and committed reversible error by admitting into evidence a tape recording of conversations obtained by a wiretap installed by Husband.

As a threshold issue we must determine if the wiretap conducted by Husband comes within the ambit of the questioned Federal Wiretap Statute. 18 U.S.C.A. §2511 in pertinent part reads as follows:

"§2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who ---

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when ---

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

* * *

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both."

While the above statute appears to provide only a criminal sanction, the second tier of a three tier system of wiretap sanctions is provided for in 18 U.S.C.A. §2515 which reads:

"§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

The third and final sanction is provided by 18 U.S.C.A. §2520 which reads:

"§2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person ---

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518 (7) of this chapter shall

constitute a complete defense to any civil or criminal action brought under this chapter."

This appears to be a case of first impression in Indiana and thus we may look to other jurisdictions for guidance in applying these statutes. Husband admits that he placed the wiretap, on his own marital home, but asserts that it was not the intent of Congress to interfere with the domestic relations between a man and his wife. He further asserts that no expectation of privacy exists between a husband and wife and that the wiretap statute can only be applied where an expectation of privacy exists. He cites as authority for his position *Simpson v. Simpson*, 490 F. 2d 803 (5th Cir. 1974).

Wife contends that the plain meaning of the language of the statute should control. She asserts that the language of 18 U.S.C.A. §2511 "Except as otherwise specifically provided in this chapter *any* person who - *** " (our emphasis) must be interpreted to mean exactly what it says. We find support for her position in the cases of *Rickenbaker v. Rickenbaker* (1976), 290 N.C. 373, 226 S.E. 2d 347, and *United States v. Jones*, 542 F. 2d 661 (6th Cir. 1976).

We find none of these cases to be controlling in this matter. The *Simpson* court expressed doubts in regard to its decision. In addition the *Simpson* case dealt basically with the civil remedy provided by the wiretap statute. The *Rickenbaker* case dealt exclusively with the exclusion of evidence in a domestic dispute; however, the telephone which was tapped was not actually in the marital home. The *Jones* case dealt with criminal charges against a husband who was no longer residing in the "marital home".

It is our opinion that Congress has enacted three separate and distinct remedies for courts to apply when confronted with a wiretap violation. We are only faced with resolving an application of the least severe of those remedies; namely, the exclusion of evidence gathered from an illegal wiretap.

It is our opinion that we must follow the plain meaning of the words of the statute when resolving questions concerning the application of the least coercive of the three tiers of remedies provided by 18 U.S.C.A. § 2510 *et seq.* It is an established rule

of statutory construction that effect will be given to the plain and unambiguous meaning of the words used. *United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed. 2d 575 (1961); *Bowen v. Review Bd. of Indiana Employment Sec. Div.* (1977), ____Ind. App.____, 362 N.E. 2d 1178.

18 U.S.C.A. §2511 states "Except as otherwise specifically provided in this chapter *any person who* - ***" (Emphasis added). We hold that the above words mean exactly what they say; namely, a spouse may not secretly place wiretap equipment on the telephone within the marital home and then claim an exemption from the above statutes. Congress explicitly and meticulously detailed the exemptions from the control of the act, and no spousal immunity was listed among those exceptions. We therefore hold that the act of Husband was within the proscribed conduct of 18 U.S.C.A. §2510 *et seq.* for the purpose of applying the exclusionary rule found in 18 U.S.C.A. §2515.

Even if we chose to look behind the plain meaning of the statute, our position finds support in both the legislative history of the act and the case interpretations of the statute. The Congress was plainly aware of the uses of electronic surveillance in marital cases. See discussion of legislative history in *United States v. Jones, supra.* Had the Congress chosen to exclude domestic wiretaps from the ambit of wiretap statutes it could have added an exception to the list of acts which were not to be covered by the statutes. See 18 U.S.C.A. §2511 (2).

It appears that Congress intended the act as a protection of the right to privacy. It is well established that the right to privacy is designed to protect people, not places. *Katz v. United States* (1967), 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 2d 576. We can see no valid reason why the right to privacy should be totally abrogated upon entry into a marriage. We therefore hold that the least severe of the three possible sanctions for illegal wiretaps should be applied in Indiana to exclude the use of such evidence in any legal proceeding. See *United States v. Jones, supra,* and *Rickenbaker, supra.* We hold that a spouse may not obtain evidence through an illegal wiretap, wield that evidence as a sword in a domestic relation action, and then hide behind that same marital status to justify the

use of his illegally obtained evidence. The wiretap evidence should not have been admitted at the trial. We specifically do not decide any liability which Husband may be under from the impact of the remaining two remedies of the wiretap act. This decision is further to be limited to its facts and applied solely to the exclusion of evidence from proceedings which are collateral to the wiretap itself.

Husband further asserts that even if the wiretap was illegal, the admission of the tapes into evidence was harmless error and within the discretion of the trial court. We must disagree. The fruits of an illegal wiretap are not admissible, *Gelbard v. United States* (1972), 408 U.S. 41, 92 S. Ct. 2357, 33 L. Ed. 2d 179; and the trial court has no discretion to exercise in the admission of illegally obtained wiretap information. *United States v. Cihal* 336 F. Supp. 261 (1972 W. D. Penn.). We therefore find that the trial court committed reversible error when the illegally obtained tape was admitted into evidence.

Wife's second allegation of error charges that reversible error was committed when a deposition (reportedly taken without notice to Wife) was admitted into evidence.

It is unquestioned that no notice was given to Wife prior to Husband taking the deposition of her alleged paramour. It is clear that lack of notice to all parties to an action is a violation of Ind. Rules of Procedure, Trial Rule 30 (B) (1) which in pertinent part reads:

> "(1) A party desiring to take the deposition of any person upon oral examination *shall give reasonable notice in writing to every other party to the action.* The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs." (Emphasis added).

It is clear that Husband violated the mandate of this rule and that the deposition was not properly taken. This would be so

regardless of any actual knowledge which the wife may have possessed, as it is written notice which is required. *Associated Transport v. Riss & Co.*, 8 F.R.D. 99 (N.D. Ohio E.D., 1948), see also 2 Harvey, *Indiana Practice* 628, Trial Rule 30 (1970).

The uses of a deposition at time of trial or hearing subsequent to the taking of a deposition are controlled by TR. 32 which reads:

> "(A) Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition, by or against any party who had reasonable notice thereof or by any party in whose favor it was given in accordance with any one [1] of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
>
> * * *
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
>
> (a) that the witness is dead; or
> (b) that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or
> (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or
> (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
> (e) upon application and notice, that such exceptional cirumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or
> (f) upon agreement of the parties."

* * *

Even if the deposition had been properly taken it would not fit within any of the permissible uses of a deposition which the Indiana Supreme Court enumerated by adopting TR. 32. The deposition of the alleged paramour of the wife is not admissible into evidence.

It is Husband's contention that the evidence contained in the deposition is merely cumulative and therefore not worthy of reversal. It is true that the vast majority of the paramour's testimony was confirmed by Wife's testimony, and this court will not reverse for admission or refusal of cumulative evidence, *Loudermilk v. Feld Truck Leasing Co. of Indiana* (1976), ____ Ind. App. ____, 358 N.E. 2d 160. However, in light of our resolution as to Issue I, we deem it instructive and necessary to hold that the deposition was improperly taken and was clearly not admissible into evidence.

Appellant's third assertion of error contends that the trial court erroneously refused to rescind the agreed provisional order. Wife contends that the provisional order dated September 30, 1976, (which granted Husband temporary custody of their minor child) was obtained under duress, undue influence, fraud, threat of force and psychological and emotional intimidation. It is Wife's contention that husband exercised such influence and coercion as to remove any free will which she may have possessed which might have enabled her to resist signing the documents.

While the evidence is strong that she may have been influenced by factors which the husband brought to bear on her free will, the evidence is not without conflict. The appel-

lant is therefore requesting we reweigh the evidence and this we will not do. *Lake County Council v. Arredondo* (1977), ____Ind. _____, 363 N.E. 2d 218. We therefore find no reversible error by the trial court in not rescinding the agreed provisional order.

IV. & V.

The final two issues concern custody of the child of the marriage and division of the marital assets. In light of our holding as to Issues I & II, we deem it unnecessary to discuss the alleged errors presented by Issues IV & V.

Reversed.

ROBERTSON, C. J. and LOWDERMILK, J. CONCUR

APPENDIX C

IN THE

SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
JUDITH GAYLE LOPP,	)	
	)	
Respondent-Appellant,	)	
	)	
and	)	No. 778 S 145
	)	
JAMES D. LOPP, Jr.,	)	
	)	
Petitioner-Appellee.	)	

APPEAL FROM VANDERBURGH SUPERIOR COURT
The Honorable Lester Nixon, Special Judge

ON PETITION TO TRANSFER

PIVARNIK, J.

This case comes to us on a transfer petition from the Court of Appeals, First District. The Vanderburgh Superior Court entered a judgment, on December 22, 1975, dissolving the marriage of the parties, husband James Lopp Jr. and wife Judith Lopp. At the same time, the trial court ordered a division of the parties' property and awarded the husband permanent custody of their minor child, James Lopp III. On appeal, the judgment of the trial court was reversed. *In re Marriage of Lopp*, (1977) Ind. App., 370 N.E. 2d 977. Husband James Lopp Jr. petitions this court to transfer this case and to set aside the judgment of the Court of Appeals.

The principal question for our review is whether the trial court's admission into evidence of tape recordings of wiretapped telephone conversations mandates reversal of this case. An examination of this question requires a close look at the sequence and context of events, surrounding the admission of these tapes, at the trial court.

The husband, James Lopp Jr., an attorney, and the wife, Judith Lopp, were married on January 9, 1971. They had one child, James Lopp III. Also, Mrs. Lopp had custody of her two children from a previous marriage.

Mr. Lopp subsequently became suspicious of his wife's activities. On September 20, 1975, Mr. Lopp attached a self-activating tape recorder to his home phone, without the knowledge of his wife. This device recorded all telephone conversations, and the tape recordings acquired in this manner apparently confirmed Mr. Lopp's suspicions that his wife was seeing another man.

On September 22, 1975, the couple became involved in a domestic crisis and separated. On this date husband James Lopp confronted his wife Judith with tape recordings of telephone conversations allegedly between her and various other parties. Mr. Lopp took physical custody of their son, James Lopp III, on this date, and moved out of the marital home.

On September 23, 1975, Judith Lopp went to her husband's law office. Her father-in-law, James Lopp Sr., also an attorney, informed her that if she did not consent to give her husband temporary custody of their son James until this conflict was resolved, he would phone her former husband, inform him of the tapes and their contents, and she could possibly lose custody of all three of her children. Judith then signed an agreed provisional order which stated, in relevant part:

> "Comes now the Husband in the above matter and files his petition for custody of parties' minor child, and comes now the wife and the parties agree as follows:
>
> 1. That the husband shall have the care, custody and control of the parties' minor child, James Daniel Lopp, III, provided, however, the Wife shall have temporary custody of said child at reasonable times.
>
> And the Court now approves the agreement of the parties and the same is now so ORDERED.
>
> ....
>
> I have read the above order and being advised of my rights to an attorney, freely and voluntarily consent and approve said order.
>
> /S/ Judy Lopp
> Wife"

On this same date, husband James Lopp Jr. filed both a Petition for Dissolution of Marriage, and a Motion for Temporary Custody of Parties' Minor Child. This motion for temporary custody, as quoted above and signed by Judith Lopp, was approved and ordered by the trial court.

On September 29, 1975, after Judith Lopp talked to an attorney, she filed a Petition for Relief which asked for temporary custody of the parties' child, adequate support, possession of the parties' home, and an order restraining Mr. Lopp from interfering with her quiet enjoyment of the home. This petition also alleged that Mrs. Lopp had been coerced into agreeing that her husband should have custody of their child.

On September 30, 1975, after a meeting between wife, husband, his father, and her attorney, the trial court approved the substance of the September 23 agreement between the couple, along with other provisions. The pertinent part of this court-approved agreement, as ordered and certified into the record, was as follows:

> "Comes now the husband by his attorney, Glenn A. Grampp, and comes now the wife by her attorney, David Kelley, and the wife's petition coming on for hearing, the parties agree as follows:

1. That the husband shall have the care, custody and control of the parties' minor child, James Daniel Lopp, III, provided however, the wife shall have the privilege of seeing and visiting the parties' minor child, one day a week from 9:00 A.M. to 5:00 P.M.

. . . .

This agreement is entered into freely and voluntarily without coercion or duress and with the wife being advised by her attorney, and having full knowledge of all the facts.

And the court now approves the agreement of the parties and the same is now so ordered."

On October 3, 1975, Judith Lopp filed a Petition for Rehearing with the trial court, in which she asked the court for a new hearing on the issue of her son's custody. Alleging that the two previous court-approved custody agreements were not voluntarily agreed to by her, Mrs. Lopp's petition stated that:

"[B]oth of her agreements herein were wrung from her by threats and coercion in that she was threatened with publication of several of her private phone calls which were recorded without her knowledge by her husband, she was threatened with total loss of her said child, her former husband, James Forman, was subpoened to the hearing and she was threatened with the influence of her husband on transferring custody of her two daughters to said James Forman. Affiant further says that she has been subjected to the Lopp infallibility in the field of law and intimidated by the assertion of her husband and his father of their influence over the courts of this area. Affiant further says that she was advised by her lawyer, David O. Kelley, not to agree but at the conference she agreed to the custody in her husband which was held in her husband's office where she feared for her children and their future as a family with

her because of the coercion, intimidation and threats aforesaid."

Subsequent to this petition, the regular trial court judge relinquished jurisdiction and a special judge was named. Further motions and petitions were filed by the parties, including a motion by Mr. Lopp to dismiss his wife's Petition for Rehearing. The trial court took the entire matter under advisement.

On November 25, 1975, the trial court considered Mrs. Lopp's Petition for Rehearing, and overruled her husband's motion to dismiss it. A hearing was then held, specifically on the issue of the alleged fraud and coercion in the procurement of the provisional custody orders. During cross-examination of Mrs. Lopp, her husband's attorney asked that the tapes be admitted. The wife's attorney, Mr. Grove, objected on the basis of 18 U.S.C. §2515 (1970). The trial judge stated that he had opposing briefs by the parties, including conflicting federal circuit opinions on the question of the admissibility of wiretaps in marital proceedings, and stated, "I'm prepared to overrule the objections to the tapes. If I'm wrong, I'll be reversed. If I rule otherwise and I'm wrong, I'd be reversed, so my best judgment is that my chances are better." There were further objections by the wife's attorney, relating to the disclosure of the names of third parties that might be involved by admitting the tapes. The court then stated, "Now, I'm just down here to try this case. Everyone in this courtroom knows who you're talking about but myself, and I'm the one who has to decide it." Husband's attorney then cross-examined Mrs. Lopp about the contents of the tape. Her attorney made foundation objections, saying that he had not reviewed the tapes, and questioned their accuracy. The following colloquy then took place between the court and wife's attorney:

THE COURT: Well, now, let me see where I am on this. She's testified that one of the reasons that she signed this was that she was afraid that the tapes would be made available to a former husband or something. Is that right?

MR. GROVE: That's correct. It was her testimony, yes.

THE COURT: And they're questioning whether or not playing those tapes was sufficient to intimidate her to get her to do it. Now, how am I going to know unless I hear the tapes: If that's going to be part of your evidence, then do I take your word for it, or am I supposed to hear the tapes? What's your position on that?

MR. GROVE: No, may I say to the Court that we have no objection if the Court does hear the tapes under any circumstances, under the appropriate rules, as a matter of fact, either by way of incamera proceedings or anything else. I'm not sure what the state of the law is. Not that I'm questioning the Court's ruling. We don't have any objection if the Court listens to the tapes, either in in camera proceedings or anything else, to help you decide. That is not the basis. I object to the format by which they are attempting to cross-examine her as to the subject matter. And because of the many questions in my mind, if the Court wishes, out of the presence of both attorneys and parties, to listen to the tapes, I have no objection whatsoever. Except, I cannot verify . . . I can't say and I don't know that my client can say that they have not been tampered with in some way, there's no evidence.

. . .

THE COURT: Of course, I certainly wouldn't listen to them without the presence of both attorneys on either side. That's part of it. I personally would rather not listen to them, if I had a preference on it.

. . .

MR. GROVE: . . . [We] have no objection as long as there are appropriate orders to protect the parties.

The trial court then impounded the tapes, at the conclusion of this hearing, and took the Petition for Rehearing under advisement along with the parties' briefs on the subject.

On December 3, 1975, after listening to the tapes, the trial court overruled Mrs. Lopp's Petition for Rehearing and motion to overrule the provisional orders of September 23 and September 30.

The final hearing on this case was opened before the trial judge on December 10, 1975. The court ordered all of the testimony and evidence from the prior hearing, which was already before the court, to be incorporated into the present hearing. During the testimony, the husband's attorney offered the tapes into evidence. The wife's attorney objected on the grounds previously raised. The trial court then admitted the tapes, marked as Petitioner's Exhibit #8, into evidence. This ruling was made on the basis of the court's two previous rulings of admissibility of the tapes, both at the former hearing and the ruling on the incorporation of all the former hearing evidence in the present hearing. The tapes were never read or transcribed into the record. Nor did the trial court hear the tapes again. Rather, they were admitted because the judge had already heard them, and so that they could be marked for reference purposes during witness testimony. The final hearing then proceeded, at which an exhaustive amount of evidence was admitted concerning the relationship of these parties, their finances and property, and their fitness for custody, including evidence of events as described in *In re Marriage of (Forman) Lopp*, (1977) Ind. App., 362 N.E. 2d 492, a case dealing with a custody modification petition from Mrs. Lopp's former divorce decree.

On December 22, 1975, the trial court issued its judgment and findings, dissolving the marriage of the parties and dividing their assets. Custody of the parties' minor son, James Lopp III, was granted to the husband, with provisions for visitation granted to Mrs. Lopp.

A Motion to Correct Errors was filed by Mrs. Lopp on

February 20, 1976. Specifications nos. 6 and 9 of this motion alleged error in the admission of the tape recordings. The trial court overruled this motion on March 3, 1976, which judgment stated as follows:

> "This cause comes before the Court on the Motion to Correct errors of the Respondent and Cross-Petitioner filed on February 20, 1976, and now the Court having considered said motion,
>
> "FINDS that the error, if any, in the admission into evidence of the matters complained of in specifications 6 and 9 of the Respondent and Cross-Petitioner's said motion constituted at most harmless error under the provisions of Trial Rule 61 of the Indiana Rules of Civil Procedure inasmuch as the evidence was merely cumulative and did not affect the substantial rights of the parties.
>
> "And now the Court having reviewed the evidence concludes that the decision and judgment of the Court on all issues is sustained by substantial evidence even to the exclusion of the evidence complained of in specifications 6 and 9 of Respondent and Cross-Petitioner's Motion to Correct Errors, and the Court hereby reaffirms the judgment entered in this cause on the 22nd day of December, 1975.
>
> "IT IS THEREFORE, ordered, adjudged and decreed by the Court that the Respondent and Cross-Petitioner's Motion to Correct Errors is overruled."

In the Court of Appeals opinion in this case, it was held that the trial court abused its discretion and committed reversible error by its admission into evidence of the tape recordings of the wife's telephone conversations. It was held specifically that the husband's conduct in placing the wiretap was proscribed conduct within the meaning of federal wiretap laws, 18 U.S.C. §2510 *et. seq.* (1970), and that the exclusionary rule of such statute thus applied. *Lopp, supra,* 370 N.E. 2d at 981. As against the husband's argument that the admission was harmless error, the Court of Appeals stated that the fruits

of an illegal search are not admissible and that the trial court has no discretion to exercise in the admission of illegally obtained wiretap information. *Id.* at 982. The Court of Appeals also discussed the right to privacy, and as another rationale for its decision stated:

> "We hold that a spouse may not obtain evidence through an illegal wiretap, wield that evidence as a sword in a domestic relation action, and then hide behind that same marital status to justify the use of his illegally obtained evidence."

Id. at 981. Thus, the opinion seems to have been based not only on the court's reading of the federal statutes, but also on public policy grounds. The case was then reversed and remanded for new determinations of the custody and property settlement issues, which issues were raised but not decided by the Court of Appeals in view of its disposition of the wiretap issue. Other evidentiary issues in this case were decided by the Court of Appeals, however, including a specific finding against the wife on her claim that the trial court's provisional orders were obtained under duress and fraud. The Court of Appeals found that the evidence was sufficient to sustain the trial court on this point. *Id.* at 983.

The husband's transfer petition to this court alleges several errors in the above opinion of the Court of Appeals. Chiefly, he argues that the federal wiretap statutes are not applicable to this case, and also reasserts his harmless error and cumulative evidence arguments. Contrary to the Court of Appeals' allusions to the wife's right of privacy, he argues that the Court of Appeals decision violates his right of privacy in his own home. He also, in his brief, says that the Court of Appeals could not have ruled on the cumulativeness of the tapes unless they "gazed into a crystal ball," since they did not say that they heard the tapes. Against this argument, the wife argues here that it is "beyond the realm of possibility" that the trial court was not prejudiced by listening to the tapes. We are thus faced with more than a few incredible arguments and novel constitutional questions, concerning the

construction of a federal statute, federalism, and rights of privacy, the upshot of which has been attempts, on both sides since the beginning of this case, to goad a trial court judge into error in a dissolution proceeding by reference to a mysterious evidentiary quantity about which the law is totally uncertain.

While we do not endorse all the claims of the husband, or his conduct, we grant transfer and reverse the opinion of the Court of Appeals, insofar as it held that the trial court's action mandates reversal of this case. Our holding is strictly limited to the particular facts and circumstances surrounding the admissibility of these tapes in this trial, as outlined above and discussed subsequently. In essence, we do not see how any more evidentiary hearings can further either justice to these parties or the best interest of their child, in view of the substantial evidence already heard. We hold that the trial judge ruled prudently concerning the tapes, and acceed to his judgment on disputed questions of fact. Also, we believe that the Court of Appeals, in relation to these facts and circumstances, fashioned an evidentiary policy which actually supports the trial judge's conduct.

The center of the legal controversy here is the applicability of the federal wiretap statutes, 18 U.S.C. §2510 *et. seq.* (1970) to the present dissolution of marriage proceeding. Section 2511 of the statute is a criminal sanction against any person who wilfully intercepts, uses, or discloses illegal wiretaps and illegal oral communication interceptions. Section 2515 of the statute, which is the part chiefly in issue here, is an exclusionary rule relating to such evidence which states as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that

> information would be in violation of this chapter."

Another part of the statute, §2520, provides for recovery of civil damages by those who have been illegally wiretapped against those who have so violated their privacy. The legislative history of these statutes states that Congressional power in this area is founded on the power to regulate interstate commerce, and that the sanctions in the act are designed to protect privacy. *See* 1968 U.S. Code Cong. & Admin. News 2177-97. This history also states that the exclusionary rule of §2515 was meant to apply in both federal and state proceedings, and is not meant to be limited to criminal proceedings. *Id.* at 2185. There have been no comparable statutes on wiretap activities passed by the legislature of this state.

Several courts have considered whether or not, as a matter of statutory construction and legislative intent, these federal statutes apply to electronic surveillance between married persons. The most celebrated cases on this question are *Simpson v. Simpson*, (5th Cir. 1974) 490 F. 2d 803, *cert. denied*, (1974) 419 U.S. 897, 95 S. Ct. 176, 42 L. Ed. 2d 141, and *United States v. Jones*, (6th Cir. 1976) 542 F. 2d 661. *Simpson* was a suit for civil damages, by a wife who was wiretapped by her husband, which held that these statutes did not apply to interspousal wiretapping. *Jones* reached the opposite conclusion, in a federal criminal prosecution against a husband who intercepted telephone communications of his wife, from whom he was then separated. The United States Supreme Court has not spoken directly to this question, and the division of opinion is reflected in other federal cases. *See Anonymous v. Anonymous*, (2d Cir. 1977) 558 F. 2d 677, *aff'g London v. London*, (S.D.N.Y. 1976) 420 F. Supp. 944 (dismissing a civil suit by wife against husband who had wiretapped her); *United States v. Schrimsher*, (5th Cir. 1974) 493 F. 2d 848 (upholding a criminal prosecution of a man who wiretapped his former lover); *Remington v. Remington*, (E.D. Pa. 1975) 393 F. Supp. 898 (denying motion to dismiss civil suit brought by husband who had been wiretapped by his wife and others).

On the precise question of the applicability of §2515, the exclusionary rule of the federal wiretap statutes, there is

a similar dearth of authority and division of opinion. In *Beaber v. Beaber*, (C.P. Stark Co. 1974) 41 Ohio Misc. 95, 322 N.E. 2d 910, a trial judge held that neither the federal wiretap statutes nor the right of privacy under the United States Constitution prevented him from listening to a husband's wiretapping of a wife's telephone conversations in the marital home. The court reasoned, in this divorce proceeding wherein child custody was in issue, that he was only listening to the tapes for impeachment purposes. On the basis of other evidence before him, the judge thought that the husband was in an "indefensible position" without the tapes, since the husband's testimony alone seemed "almost unbelievable" until the tapes were admitted, which tapes vindicated him and "completely obliterated" the otherwise believable testimony of his wife. *Id.*, 41 Ohio Misc. at 97, 103, 322 N.E. 2d at 912, 915. The trial judge's opinion was affirmed in an unpublished opinion by the Ohio Court of Appeals, *Beaber v. Beaber*, No. 4187 (Ohio App., 5th Dist., Aug. 4, 1975). The Ohio Court of appeals also saw the question as one of admitting the wiretaps solely for purposes of impeachment, upon the issue of witness credibility relative to alleged perjury in fraudulently obtaining a court order, rather than as a question of using such wiretaps as substantive proof in the case, absent perjury. *Id.*, slip op. at 14-15. The court concluded, after recognizing the federal line of authority that otherwise unconstitutional evidence can be used for impeachment purposes, that:

> "The law has justice not injustice as its purpose. Justice not injustice is the end sought by the United States Constitution, the Constitution of the State of Ohio, and by the laws of the United States, of the State of Ohio, and the Courts. Although under some other circumstances the tapes might be constitutionally inadmissible or their admission might be prohibited by statute, under the facts of the instant case there can be no justification for permitting the plaintiff to turn the method by which the tapes were obtained to her own advantage, and thus provide herself with a shield against contradiction of her own untruths."

Id., slip op. at 17-18. Although the *Beaber* courts discussed issues similar to the question of the applicability of 18 U.S.C. §2515, unfortunately, that exclusionary rule section of the federal wiretap statute was not cited or discussed in their opinions. Section 2515 was cited and discussed briefly by the Florida courts in *Markham v. Markham*, (Fla. App. 1972) 265 So. 2d 59, *aff'd*, (Fla. 1973) 272 So. 2d 813. This case was a dissolution of marriage action, in which the husband offered wiretaps of telephone conversations of his wife on the issue of temporary custody of the children. The trial court did not think that the federal statutes necessitated an exclusion of this evidence, but this decision was held reversible at both levels of state appellate review. It was agreed that the general right of privacy of persons was a matter of state, not federal, law. *Id.*, (Fla. App.) 265 So. 2d at 60-61. However, it was found that both the Florida Constitution and the applicable statutes of Florida prohibited the use of such evidence as a matter of state law. *Id.*, (Fla. App.) 265 So. 2d at 61-62; (Fla.) 272 So. 2d at 814. The same result was reached in the North Carolina case of *Rickenbaker v. Rickenbaker*, (1976) 28 N.E. App. 644, 222 S.E. 2d 463, *aff'd*, (1976) 290 N.C. 373, 226 S.E. 2d 347. In this case, a husband who was no longer living in the marital home wiretapped his wife, who was still living there, and attempted to admit such evidence in a divorce action where child custody was in issue. The state appellate courts both construed §2515, holding that it clearly prohibited the use of wiretapping in evidence, in the case at hand, and that this federal law was binding on state judges. *Id.*, 28 N.C. App. at 647-48, 222 S.E. 2d at 465; 290 N.C. at 381-82, 226 S.E. 2d at 352-53. In our own state, the first time that §2515 has ever come into question is in the present case, and the only opinion on it is that of the Indiana Court of Appeals here under review.

A review of all the above authority leads to two conclusions pertinent to the case before us. First, the precise question which we face has not yet been decided by any other court. That question, as we see it, is whether or not wiretapped telephone conversations are admissible in a marital action wherein it is claimed that they have been used to coerce or

blackmail a party into a court-approved agreement, thereby also defrauding the court. This is thus a different question, of statutory interpretation and legislative intent, from the more general question of whether §2515 can be construed to mandate exclusion of wiretaps as substantive proof on the merits of the controversy. Seen in this light, the present question is most analogous to that faced by the Ohio courts in *Beaber, supra,* wherein it was only decided whether the tapes could be used for impeachment purposes as to alleged perjury in attempting to obtain a court order. Our second conclusion, drawn from the authorities, is that questions of federalism are necessarily involved in any application of §2515 to marital actions. This is because both the clear language and legislative history of the statute arguably foreclose *any* exceptions to its rule, as a matter of statutory interpretation. As phrased in *Anonymous, supra,* 558 F. 2d at 677, "The issue becomes at what point interspousal wiretaps leave the province of mere marital disputes, a matter left to the states, and rise to the level of criminal conduct prescribed by the federal wiretap statutes." The issue was also seen in this light by Circuit Judge Bell, now the United States Attorney General, in *Simpson, supra,* 490 F. 2d at 805, though he purportedly resolved this underlying question of federalism as a matter of statutory interpretation.

On the question of statutory interpretation before this court, we find that §2515 would lead to an illogical and absurd result if read to mandate reversal of the present case. The record is clear that the tapes were listened to by the trial court for the purpose of deciding the question of fraud and coercion in the procurement of the provisional custody orders of September 23 and September 30. This question of fraud and coercion was brought forward by Mrs. Lopp, after she had signed the orders, and the first hearing in this case was specifically had on that issue. Thus, at the time the trial court had to decide the fraud question, he had two contradictory representations of Mrs. Lopp herself: her signature on the provisional custody agreement, with the statement there that she had advisedly and freely and voluntarily entered into it, and her present claim and testimony that her will had been

overborne by fraud and coercion tantamount to blackmail. The claim of fraud and coercion was based on the existence of the tapes of Mrs. Lopp's phone conversations, which evidence the trial court correctly observed that he had only the representations of the attorneys about. Mrs. Lopp did not object to the trial court hearing the tapes for this purpose. The trial court then heard the tapes, which were never transcribed into the record. We doubt that Mrs. Lopp would still be objecting to the admission of the tapes, had the trial court in fact found that their subject matter was such as could have overborne her will.

The Court of Appeals has stated in this case that a spouse should not be able to wield illegal wiretaps "as a sword in a domestic relation action," and then be able to hide behind the marital status that he has wielded the sword against to justify the admission of such evidence. *Lopp, supra,* 370 N.E. 2d at 981. However, if this statement is either correct as an interpretation of the federal wiretap statutes, or laudatory as an expression of state judicial policy, it actually supports the action of the trial judge in this case. He specifically heard the tapes because of allegations that the husband had improperly wielded this evidence in order to gain the wife's assent to custody orders. The trial judge was thus actually trying to prevent the kind of overreaching about which the Court of Appeals is concerned. An exclusionary rule, which would prevent the hearing of the tapes even for this purpose, would not necessarily prevent the use of wiretapped private phone conversations for blackmail. Even if the tapes are inadmissible as evidence in a courtroom, they could be used in other ways that might coerce a person into signing a court agreement. In the present case, for instance, Mrs. Lopp was purportedly afraid that her former husband would have access to the tapes. If the tapes were thus inadmissible for purposes of showing the subtance of such fraud and coercion, the person they were used against would be left without anything, other than his own testimony, with which to evidence the coercion before the court. It is unfortunate that electronic surveillance equipment can be used for such purposes generally in society, but as long as this equipment is in existence a blanket evidentiary

exclusionary rule cannot prevent all possible abuse. On the other hand, if the type of blackmail alleged here is to be guarded against when court orders relating to custody are at stake, the tapes must be admissible to evidence such fraud. Otherwise, the trial judge would have only the representations of the parties and their attorneys on which to base a decision. In such event, a spouse could claim coercion and defraud the judge by merely wielding harmless, or even blank tapes, which the judge could not hear. It is a well established principle of statutory interpretation that if a statute is open to two interpretations, the presumption is that the legislature intended the more reasonable of the two, for the legislature cannot be presumed to have expected that a statute be applied in an illogical and absurd manner. *See, e.g., Kerlin's Lessee v. Bull,* (1786) 1 U.S. (1 Dall.) 175, 1 L.Ed. 88; *Pryor v. State,* (1973) 260 Ind. 408, 296 N.E. 2d 125; *In re Adoption of Jackson,* (1972) 257 Ind. 588, 277 N.E. 2d 162. Even if we ascribe to the national Congress, in the enactment of §2515 and other federal wiretap statutes, a legislative purpose of preventing wiretap abuse in domestic relations matters, *see Jones, supra,* 542 F. 2d at 668-71, that purpose is in fact hindered by the application of §2515 to mandate reversal of this case. Thus in view of all the facts and circumstances herein, we hold the action of the trial judge in this case to be proper, and not reversible error. We believe that the other interpretation urged by Mrs. Lopp on appeal, leads to an illogical and absurd result which we presume that the national Congress did not intend.

Underlying the decision we reach is a consideration of due process. Certainly, it is essential in custody determination that agreements between parties before the court, given the trial judge's approval and entered as his orders, be freely agreed to as expressions of the parties' intent, and not be the product of fraud and blackmail. Our trial rules provide for relief from court orders and judgments on the basis of "fraud, misrepresetation, or other misconduct of an adverse party." Ind. R. Tr. P. 60 (B) (3). As stated by the Ohio Court of Appeals, the end sought by both state and federal constitutions and statutes is justice, not injustice. *Beaber,* (Ohio App.), *supra,* slip op. at

17-18. *See also* U.S. Const. amend. V, amend. XIV: Ind. Const. art. 1, §12. Further, the type of order involved here, of child custody, is a special concern of the trial judge apart from the interests, selfish or otherwise, of either the husband or wife in a dissolution proceeding. The trial judge has the responsibility to assure that such orders are entered in accordance with the best interests of the child. Ind. Code § 31-1-11.5-21 (Burns Supp. 1975); *Schwartz v. Schwartz,* (1976) Ind. App., 351 N.E. 2d 900, 901. It cannot be seriously claimed that a fraudulently procured custody order, if such were in fact the case, furthers either the best interest of the child or an orderly process for a determination of what that interest is. We thus, in the present situation, feel that to the extent §2515 can be read to the contrary, it would be an unconstitutional impairment of an integral and essential function of state court judges, the entering of efficacious orders, free of fraud, which function here is related to a service traditionally performed by state judges and expected of them by their legislatures and citizens, the providing for the best interests of the children in domestic relations disputes. *See National League of Cities v. Usery,* (1976) 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245, construing U. S. Const. amend X. We seriously doubt, however that the national Congress intended such an interpretation and application of §2515. Since another part of the federal wiretap statute, §2520, provides for civil damages for persons aggrieved by electronic surveillance, the federal courts in such a case would presumably be compelled to listen to the wiretaps, to prove their existence, as an essential element of the case. That function is directly analogous to the purpose for which the trial judge listened to the tapes in this case.

We also do not agree that the trial judge's later admission of the tapes at the final hearing mandates reversal of this case. At the time of the final hearing, the tapes had already been admitted for a proper purpose, and for a purpose which Mrs. Lopp did not object to. The trial judge had already listened to them, and it was not suggested by anyone that he disqualify himself from the case for this reason. It is clear that the tapes were only readmitted as part of a general order to incorporate

all evidence already before the court into the final hearing, and for purposes of marking them as an exhibit in the case. The trial judge did not listen to the tapes again, nor were they read or transcribed into the record. Finally, the trial judge made two specific findings of fact on this question: that the tapes were merely cumulative and did not affect the substantial rights of the parties, thus constituting harmless error under Ind. R. Tr. P. 61, and that the final judgment on all issues was sustained by substantial evidence even to the exclusion of the tapes. In addition to these findings, the trial judge had previously found against the wife on her claim of fraud and coercion, toward which claim the substance of the tapes was supposedly probative. The Court of Appeals in this case has specifically affirmed the trial court on this finding of fact. *Lopp, supra,* 370 N.E. 2d at 983. This holding of the Court of Appeals is consistent with the principle that in reviewing actions of a trial court, we neither weigh the evidence nor determine the credibility of witnesses. *B & T Distributions, Inc. v. Riehle,* (1977) Ind. , 366 N.E. 2d 178, 180; *Lake County Council v. Arredondo,* (1977) Ind. , 363 N.E. 2d 218, 219.

Thus, we do not here decide the question of the applicability of 18 U.S.C. §2515 (1970), to the use of wiretap evidence on the substantive merits of the child custody question, because it is apparent that this question is not properly before us in this case. In the final analysis, this court must be the judge of its constitutional jurisdiction, and this jurisdiction, as embodied in the Constitution of Indiana by the people themselves acting in a sovereign capacity, is entitled to strict construction. *Warren v. Indiana Telephone Co.,* (1940) 217 Ind. 93, 26 N.E. 2d 399, *construing* Ind. Const. art. 7. Whatever the resolution of the question concerning the general scope of §2515, we do note that the harmless error doctrine has been applied to the admission of illegal wiretap evidence in the case of *United States v. Quintana,* (7th Cir. 1975) 508 F. 2d 867. There, the court stated that wiretaps, in violation of the same federal statutory scheme that is in issue in this action, were "merely cumulative to the great weight of other evidence" and "did not affect the substantial rights of the

parties." *Id.,* at 873. Their admission was thus harmless beyond a reasonable doubt under the concept of *Chapman v. California,* (1967) 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705. The same assessment was made by the trial judge in this proceeding, and we decline to engage in any presumptions concerning that judge's bias or prejudice based solely on the fact that he heard the tapes. The harm arising from evidentiary error is lessened substantially when the trial is by the court sitting without a jury. *See generally Shira v. State,* (1918) 187 Ind. 441, 119 N.E. 833; *King v. State,* (1973) 155 Ind. App. 361, 292 N.E. 2d 843. Without a transcription of these tapes before us to demonstrate their supposed prejudice, the presumptions in favor of the trial court's judgment apply in full force, and we must agree, in light of all the circumstances of this case, that the error, if any, in his hearing of the tapes was harmless beyond a reasonable doubt.

Four other questions need to be discussed here. Because of its disposition of this case on the issue of wiretap admission, the Court of Appeals did not reach two other arguments of Mrs. Lopp, alleging abuse of discretion in both the trial court's grant of permanent custody and its division of marital property. To a great extent, these arguments depend on the assumption that the trial court was unduly prejudiced by listening to the tapes, which assumption we have rejected. The remainder of these arguments, essentially, are a reargument of the conflicting evidence in this case and the relative weight to be accorded it. We have reviewed these arguments, and find that the evidence, while conflicting, is of enough substance to support the judgment of the trial court on the questions of custody and property division. We also agree with the Court of Appeals' disposition of the two other evidentiary issues in this case: that the admission of a deposition of wife's paramour was erroneous, but harmless since the deposition was merely cumulative, and; that there is sufficient evidence to support the trial court's finding on the issue of the wife's voluntary assent to the provisional custody orders. *Lopp, supra,* 370 N.E. 2d at 982-83. We fail to see how any further evidentiary hearings in this matter could lead to other results, or be in the best interest of the parties' minor child.

Transfer is granted, and the decision of the Court of Appeals in this case is vacated. The judgment of the trial court is affirmed in all respects.

GIVAN, C.J., HUNTER, PRENTICE, JJ. CONCUR.

DeBRULER, J. DISSENTS.

APPENDIX D

IN THE

SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
JUDITH GAYLE LOPP,	)	
Respondent-Appellant	)	
	)	
and	)	NO. 778 S 145
	)	
JAMES D. LOPP, JR.,	)	
Petitioner-Appellee	)	

You are hereby notified that the Indiana Supreme Court has on this date denied Appellant's Petition for Rehearing.

dated September 18, 1978 Givan, C.J.

APPENDIX E

OBJECTION BY PETITIONER TO INTRODUCTION OF TAPES AS SUBSTANTIVE EVIDENCE AT HEARING ON MOTION TO SET ASIDE PROVISIONAL ORDER

MR. GROVE: Well, Your Honor, I previously filed and submitted to the Court a motion and secondly, we have cited to the Court the *U.S. Code, Section 2511, Chapter 18 of the U.S. Code,* and we contend, under the circumstances that there should be no reference whatsoever. We feel that they are. . .were improperly and illegally taken. That Statute, as the Court is aware, prohibits, without advance notice to the participating party, the presence of any kind of taped conversation. It provides that anyone who willfully uses or endeavors to use or procures any other person to use any electronic mechanical or other device to intercept oral communications, and so and so forth, I'm sure the Court is. . .(Reprinted from Tr. p. 472, reprinted in its entirety in the Motion to Correct Errors and Memorandum of Facts and Grounds in Support of the Motion Tr. p. 1; reprinted Appellants Brief p. 57; and reprinted in Appellant's Brief in Opposition to Husband's Motion to Transfer to Indiana Supreme Court p. 10.)

APPENDIX F

OBJECTION BY PETITIONER TO INTRODUCTION OF TAPES AS SUBSTANTIVE EVIDENCE IN HUSBANDS CASE-IN-CHIEF AT FINAL HEARING ON PETITION FOR DISSOLUTION OF MARRIAGE

MR. GROVE: Your Honor, we would, at this point object to the admission of the tapes and this is for record purposes. We previously made a record and as I recall, and I do not have a copy, as I recall the statute before me, its 18 USC and I think its 1255 which, and I provided the Court a copy of that statute which prohibits the use or the taping of any conversations without consent of the parties to the conversation. I'm sorry, its 2511 - 18 USC - 2511 which prohibits the interception and disclosure of wire or oral communications without certain conditions and it makes it a crime to so publish those tapes unless the parties have knowledge and unless the individual is a common carrier - notified - they've gotten permission and we do not believe that under that statute either under the prohibition found in Section I a, b and sub-parts of b or under Section II, they have established a basis, of that statute, they have established a basis on which these tapes can be admitted into evidence. They have neither established that the tapes are done with consent or there was any authority from the persons whose conversations were being disclosed, had knowledge or consented to such disclosure.

MR. RICE: Have you concluded?

MR. GROVE: Yes.

MR. RICE: I would like to ask a couple of omitted questions in response to the objection.

Q. Now, on the dates that this device was placed in your home, will you state whether or not you and your wife were still married?

A. Yes, we were.

Q. Was any restraining order or any other inhibition placed upon you from going on or about the premises?

A. No. We both lived in the house.

Q. You were living in the house yourself?

A. Yes.

Q. And this was your own telephone?

A. Yes.

Q. O.K. Will you state to the Court who placed the bugging device on the phone?

A. I did.

Q. You did, yourself?

A. Yes.

MR. RICE: You may re-cross examine.

CROSS EXAMINATION BY RODNEY H. GROVE:

Q. Is it not true that the tape machine on which the recording was made belongs to a detective agency, Ira Clark Agency, here in Evansville?

A. It belongs to Rick Kirby who is the president of that agency.

Q. All right.

A. Personal property I believe.

Q. And he was the one who instructed you in the use in connection of the tape to the telephone wires?

A. Yes.

Q. It was not disclosed to the respondent in this case that the conversations were being taped?

A. No.

Q. You were not an officer or an employee of any communication common carrier, are you?

A. No.

Q. You are not an officer or agent of the Federal Communications Commission?

A. No.

Q. I'm talking about - I'm directing your attention to the time the wires were tapped. You were not acting as a police officer under any law or in any official police capacity, were you?

A. No.

Q. You are not a member or associated with any executive branch of the United States Government receiving its direct authority from the President of the United States are you or at the time you made this tap?

A. No.

Q. Did you notify any of the parties whose conversations may have been recorded other than the respondent in this case, that their telephone conversations with the 'phone number at the residence which was what - what was that, your 'phone number?

A. 867-5552.

Q. Did you notify any person that called that their conversations were being taped in any way?

A. No.

Q. From your telephone you had the ability to call long distance to anyplace in the United States, do you not, Mr. Lopp?

A. I assume. Its an ordinary telephone is all I know.

Q. Have you ever placed a call long distance from that particular telephone?

MR. RICE: We're going to object to that. The question is whether or not you could possibly - whether or not its taped, contains any interstate messages. I don't think that's controlling either.

COURT: I don't think it will help very much the Court deciding this case anyway. I'll sustain the objection.

MR. GROVE: Well, I'm merely asking concerning provisions of the statute.

MR. RICE: Have you concluded?

MR. GROVE: Yes. That's my objection, your Honor.

COURT: Well, I'll overrule the objection and admit the Plaintiff's Exhibit No. 8 into evidence.

(Reprinted from TR. pp. 675-78; reprinted in Motion to Correct Errors and Memorandum of Facts and Grounds in Support of the Motion TR. p. 1; reprinted in Appellants Brief p. 62; and reprinted in Brief in Opposition to Husband's Motion for Transfer to Indiana Supreme Court pp. 10-13.)

Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-928

JUDITH LOPP (DUNCAN), *Petitioner*

vs.

JAMES D. LOPP, JR., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78-928

JUDITH LOPP (DUNCAN), *Petitioner*

vs.

JAMES D. LOPP, JR., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, James D. Lopp, Jr., respectfully prays this court deny issuance of a Writ of Certiorari to the Supreme Court of Indiana, thereby refusing to review the decision entered by that Court in Cause No. 778 S 145 on July 20, 1978.

OPINION BELOW

The opinion of the Indiana Supreme Court is reported at _____ Ind. ____ 378 N.E. 2d 414 (1978), and appears in Respondent's Appendix A to this Petition.

STATEMENT OF THE CASE

The Respondent (husband) used an electronic recording device attached to his home telephone to record conversations between his wife and a paramour. As a result of wire-tapping, the Respondent (husband) overheard conversation between the Petitioner (wife) and her paramour. The recording device used by the Respondent (husband) was attached by him to his own telephone, in his own home while he was living in said house and occupying the same during coveture with petitioner (wife). There was no act of trespass by the respondent (husband) or any third party or detective, and there was no third party intrusion into the home.

The Respondent (husband) was suspicious of his wife's love affairs and as a Protector of his wife, marriage home and of his family, there was merely an interspousal taping of a conjugal telephone during coveture. The recording was not made under direction of a private investigator.

"The principal question for our review is whether the trial court's admission into evidence of tape recordings of wiretapped telephone conversations mandates reversal of this case. An examination of this question requires a close look at the sequence and context of events, surrounding the admission of these tapes, at the trial court.

The husband, James Lopp, Jr., an attorney, and the wife, Judith Lopp, were married on January 9, 1971. They had one child, James Lopp III. Also, Mrs. Lopp had custody of her two children from a previous marriage.

Mr. Lopp subsequently became suspicious of his wife's activities. On September 20, 1975, Mr. Lopp attached a self-activating tape recorder to his home phone, without the knowledge of his wife. This device recorded all telephone conversations, and the tape recordings acquired in this manner apparently confirmed Mr. Lopp's suspicions that his wife was seeing another man.

On September 22, 1975, the couple became involved in a domestic crisis and separated. On this date husband James Lopp confronted his wife Judith with tape recordings of telephone conversations allegedly between her and various other

parties. Mr. Lopp took physical custody of their son, James Lopp III, on this date, and moved out of the marital home. (Resp. app. A., Page 21)

On September 23, 1975, the Respondent, James D. Lopp Jr. filed a petition for dissolution of his marriage to the Petitioner, Judith Lopp (now Duncan - - She has since married her paramour.)

On September 23, 1975, Petitioner and Respondent, signed an agreed entry giving the respondent custody of the parties' child during pendency of the action. (Respondent's Appendix A, Page 2)

On September 29, 1975, Petitioner filed a Petition for Custody of Child. (Respondent's Appendix A, Page 3)

On September 30, 1975 with Petitioner represented by an attorney, entered into another agreed entry giving repondent, husband, custody of parties' child. (Respondent's Appendix A, Page 3)

On October 3, 1975, Petitioner filed a Petition for Rehearing and ask the court for a new hearing on issue of son's custody, alleging that the two, previous court-approved, custody agreement were not voluntarily agreed to by her. (Respondent's Appendix A, Page 4)

A hearing was then held specifically on the issue of the alleged fraud and coercion in the procurement of the provisional custody orders.

During cross-examination of Petitioner, Respondent's attorney asked that the tapes be admitted. Petitioner's attorney objected.

Then the following colloquy took place between the Court and Petitioner's (wife) attorney: (Respondent's Appendix A, Page 5)

> "THE COURT: Well, now, let me see where I am on this. She's testified that one of the reasons that she signed this was that she was afraid that the tapes would be made available to a former husband or something. Is that right?
>
> MR. GROVE: That's correct. It was her testimony, yes.
>
> THE COURT: And they're questioning whether or

not playing those tapes was sufficient to intimidate her to get her to do it. Now, how am I going to know unless I hear the tapes: If that's going to be part of your evidence, then do I take your word for it, or am I supposed to hear the tapes? What's your position on that?

MR. GROVE: No, may I say to the court that we have no objection if the Court does hear the tapes under any circumstances, under the appropriate rules, as a matter of fact, either by way of incamera proceedings or anything else. I'm not sure what the state of the law is. Not that I'm questioning the Court's ruling. We don't have an objection if the Court listens to the tapes, either in incamera proceedings or anything else, to help you decide. That is not the basis. I object to the format by which they are attempting to cross-examine her as to the subject matter. And because of the many questions in my mind, if the Court wishes, out of the presence of both attorneys and parties, to listen to the tapes, I have no objection whatsoever. Except, I cannot verify . . . I can't say and I don't know that my client can say that they have not been tampered with in some way, there's no evidence.

THE COURT: Of course, I certainly wouldn't listen to them without the presence of both attorneys on either side. That's part of it. I personally would rather not listen to them, if I had a preference on it.

MR. GROVE: . . . (we) have no objection as long as there are appropriate orders to protect the parties. (Respondent's Appendix A Page 6)

The trial court then impounded the tapes, at the conclusion of this hearing, and took the Petition for Rehearing under advisement along with the parties' briefs on the subject. (Respondent's Appendix A, Page 7)

On December 3, 1975, after listening to the tapes, the trial court overruled Mrs. Lopp's Petition for Rehearing and Motion to overrule the provisional orders of September 23 and September 30. (Respondent's Appendix A, Page 7)

The final hearing on this case was opened before the trial judge on December 10, 1975. The court ordered all of the testimony and evidence from the prior hearing, which was already before the court, to be incorporated into the present hearing. During the testimony, the husband's attorney offered the tapes into evidence. The wife's attorney objected on the grounds previously raised. The trial court then admitted the tapes, marked as Petitioner's Exhibit #8, into evidence. This ruling was made on the basis of the court's two previous rulings of admissibility of the tapes, both at the former hearing and the ruling on the incorporation of all the former hearing evidence in the present hearing. The tapes were never read or transcribed into the record. Nor did the trial court hear the tapes again. Rather, they were admitted because the judge had already heard them, and so that they could be marked for reference purposes during witness testimony. (Respondent's Appendix A, Page 7)

On December 22, 1975, the trial court issued it's judgment and findings, dissolving the marriage of the parties and dividing their assets. Custody of the parties' minor son, James Lopp III, was granted to the husband, with provisions for visitation granted to Mrs. Lopp. (Respondent's Appendix A, Page 7)

A Motion to Correct Errors was filed by Mrs. Lopp on February 20, 1976. Specifications Nos. 6 and 9 of this motion alleged error in the admission of the tape recordings. The trial court overruled this Motion on March 3, 1976, which judgment stated as follows: (Appendix A, Page 8).

"This cause comes before the Court on the Motion to Correct errors of the Respondent and Cross-Petitioner filed on February 20, 1976, and now the Court having considered said motion,

FINDS that the error, if any, in the admission

into evidence of the matters complained of in specifications 6 and 9 of the Respondent and Cross-Petitioner's said motion constituted at most harmless error under the provisions of Trial Rule 61 of the Indiana Rules of Civil Procedure inasmuch as the evidence was merely cumulative and did not affect the substantial rights of the parties.

"And now the Court having reviewed the evidence concludes that the decision and judgment of the Court on all issues is sustained by substantial evidence even to the exclusion of the evidence complained of in specifications 6 and 9 of Respondent and Cross-Petitioner's Motion to Correct Errors, and the Court hereby reaffirms the judgment entered in this cause on the 22nd day of December, 1975.

"IT IS THEREFORE, ordered, adjudged and decreed by the Court that the Respondent and Cross-Petitioner's Motion to Correct Errors is overruled."

REASONS FOR DISALLOWANCE OF THE WRIT

A.

THERE IS NO FEDERAL QUESTION PRESENTED BY PETITIONER

Petitioner presents only one alleged question. Said question reads as follows:

"Question Presented

Does the Ominbus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. §2515, bar the use of tape recorded conversations between a wife and an unrelated third person as evidence in a divorce proceeding where the husband obtains the tapes prior to filing a divorce petition by using a tape recorder furnished by a private detective records the conversations by attaching a self-activating tape recorder to the telephone line located in the marital home." (Page 2 of Petitioner's Petition)

Said Statute referred to did not present any Federal question to the Trial Court, Indiana Supreme Court, nor does it present any question to this Court for the following reasons:

I.

INDIANA SUPREME COURT DID NOT DECIDE THE QUESTION OF THE APPLICABILITY OF 18 U.S.C. Sec. 2515 (1970)

The Supreme Court in it's opinion, page 18, paragraph 2 of the respondent's Appendix found and stated:

"Thus, we do not here decide the question of the applicability of 18 U.S.C. §2515 (1970), to the use of wiretap evidence on the substantive merits of the child custody question, because it is apparent that this question is not properly before us in this case. In the final analysis, this court must be the judge of its constitutional jurisdiction, and this jurisdiction, as embodied in the Constitution of Indiana by the people themselves acting in a sovereign capacity, is entitled to strict construction. Warren v. Indiana Telephone Co., (1940) 217 Ind. 93, 26 N.E. 2d 399, construing Ind. Const. art.7. Whatever the resolution of the question concerning the general scope of §2515, we do note that the Harmless Error doctrine has been applied to the admission of illegal wiretap evidence in the case of United States v. Quintana, (7th Cir. 1975) 508 F. 2d 867. There, the court stated that wiretaps, in violation of the same federal statutory scheme that is in issue in this action, were "merely cumulative to the great weight of other evidence" and "did not affect the substantial rights of the parties." I.D., at 873. Their admission was thus harmless be-

yond a reasonable doubt under the concept of Chapman v. California, (1967) 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705. The same assessment was made by the trial judge in this proceeding, and we decline to engage in any presumptions concerning that judge's bias or prejudice based solely on the fact that he heard the tapes. The harm arising from evidentiary error is lessened substantially when the trial is by the court sitting without a jury. See generally Shira v. State, (1918) 187 Ind. 441, 119 N.E. 833; King v. State, (1973) 155 Ind. App. 361, 292 N.E. 2d 843.

Without a transcription of these tapes before us to demonstrate their supposed prejudice, the presumptions in favor of the trial court's judgment apply in full force, and we must agree, in light of all the circumstances of this case, that the error, if any, in his hearing of the tapes was harmless beyond a reasonable doubt.

B.

UNITED SUPREME COURT IS LIMITED TO REVIEW CASES THAT INVOLVE FEDERAL QUESTION ONLY

28 U.S.C.S. Section 1257 in part reads as follows:

§1257. State courts; appeal; certiorari
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity

is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The jurisdiction of the Supreme Court to review the proceedings of a State Court is not of a general reviewing Court on appeal, but is limited to the specific instance of denials of federal rights. Waters-Pierce Oil Co. of Texas, 212 U.S. 86, 53 L. Ed. 417, 29 S. Ct. 220.

Where the suit draws in question the validity of neither a federal nor a state statute, appeal from the decisions therein cannot be taken, even though a title, right, privilege or immunity under the Federal Constitution is asserted. Longest v. Langford, 274 U.S. 499, 47 S. Ct. 668.

Unless the case involves a federal question, the judgment therein is not reviewable in the Supreme Court. Hunter Co. v. McHugh 320 U.S. 222, 64 S. Ct. 19.

It must appear from the record that a real and substantial federal question was involved and the decision of the State Court on the federal question was necessary to its determination of the cause.

The Supreme Court has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state grounds or non-federal grounds. Herb v. Pitcain, 324 U.S. 117, 65 S. Ct. 459.

From the opinion of the Indiana Supreme Court in this case, the court did not decide a federal question and for this reason, should not accept a Petition for Writ of Certiorari.

As set out in 100 L. Ed. 1200, that review by the Supreme Court of a State court decision requires that it be shown

(1) that the State court actually decided a federal question, and
(2) That decisions of the federal question was necessary to the State court's determination of the cause.

This case before this Court does not qualify under said requirements. Where it is clear, as it is here, that the

highest state court having jurisdiction to hear the federal question presented, and that where the decision of the State court might finally determine the issue on a state ground and not on a federal ground, this court should not undertake to review it. However, if the independent state ground is a sufficient or substantial one, it should be presumed that the State court did not base its decision on the federal question. Durley v. Mayo, 351 U.S. 277, 76 S. Ct. 806. There can be no doubt that the Indiana Supreme Court based its decision upon a dispositive state ground, substantially, and sufficiently. No federal question is even recognized as existing in the opinion of the Indiana Supreme Court. Therefore, in that the question raised in Petitioner's Petition for Writ of Certiorari has been adequately answered on state grounds under interpretation of state law, her petition should not be allowed.

II.

THE SUPREME COURT OF INDIANA AND TRIAL COURT FOUND TAPES MERELY CUMULATIVE and AT MOST, HARMLESS ERROR

The trial court in overruling the Petitioner's Motion to Correct Errors rendered the following Judgment: (Respondent's Appendix A, Page 8)

> "This cause comes before the Court on the Motion to Correct Errors of the Respondent and Cross-Petitioner filed on February 20, 1976, and now the court having considered said motion:
>
> Finds that the error, if any, in the admission into evidence of the matters complained of in specifications 6 and 9 of the Respondent and Cross-Petitioner's said motion constituted at most harmless error under the provision of Trial Rule 61 of the Indiana Rules of Civil Procedure inasmuch as the evidence was merely cumulative and did not affect the substantial rights of the parties.
>
> "And now the Court having reviewed the evidence concludes that the decision and judgment of the court on all issues is sustained by substantial evidence even to the exclusion of the evidence complained of in specifications 6 and 9 of Respondent and Cross-Petitioner's Motion to Correct Errors, and the Court hereby reaffirms the judgment entered in this cause on the 22nd day of December, 1975."
>
> IT IS THEREFORE, ordered, adjudged and decreed by the Court that the Respondent and Cross-Petitioner's Motion to Correct Errors is overruled."

The law is well settled that the erroneous admission of inadmissible evidence will not be cause for reversal where such evidence is merely cumulative in nature. The Indiana Supreme Court in it's opinion found and stated: (Respondent's Appendix A, Page 17, Paragraph 2)

> "At the time of the final hearing, the tapes had already been admitted for a proper purpose, and for a purpose which Mrs. Lopp did not object to. The trial judge had already listened to them, and it was not suggested by anyone that he disqualify himself from the case for this reason. It is clear that the tapes were only readmitted as part of a general order to incorporate all evidence already before the court into the final hearing, and for purposes of marking them as an exhibit in the case. The trial judge did not listen to the tapes again, nor were they read or transcribed into the record. Finally, the trial judge made two specific findings of fact on this question: that the tapes were merely cumulative and did not affect the substantial rights of the parties, thus constituting harmless error under Ind. R. Tr. P. 61 and that the final judgment on all issues was sustained by substantial evidence even to the exclusion of the tapes. In addition to these findings, trial judge had previously found against the wife on her claim of fraud and coercion, toward which claim the substance of the tapes was supposedly probative. The Court of Appeals in this case has specifically affirmed the trial court on this finding of fact. Lopp, supra, 370 N.E. 2d at 983.

This holding of the Court of Appeals is consistent with the principle that in reviewing actions of a trial court, we neither weight the evidence nor determine the credibility of witnesses. B & T Distributions, Inc. v. Riehle, (1977) _____ Ind. _____, 366 N.E. 2d 178, 189; Lake County Council v. Arredondo, (1977) Ind. , 363 N.E. 2d 218, 219.

Whatever the resolution of the question concerning the general scope of §2515, we do note that the harmless error doctrine has been applied to the admission of illegal wiretap evidence in the case of United States v. Quintana (7th Cir. 1975) 508 F. 2d 867. There, the court stated that wiretaps, in violation of the same federal statutory scheme that is in issue in this action, were "merely cumulative to the great weight of other evidence" and "did not affect the substantial rights of the parties." Id., at 873. Their admission was thus harmless beyond a reasonable doubt under the concept of Chapman v. California (1967) 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705. The same assessment was made by the trial judge in this proceeding, and we decline to engage in any presumptions concerning that judge's bias or prejudice based solely on the fact that he heard the tapes. The harm arising from evidentiary error is lessened substantially when the trial is by the court sitting without a jury. See generally Shira v. State, (1918) 187 Ind. 441, 119 N.E. 833; King v. State, (1973) 155 Ind. App. 361, 292 N.W. 2d 843.

Without a transcription of these tapes before us to demonstrate their supposed prejudice, the presumptions in favor of the trial court's judgment apply in full force, and we must agree, in light of all the circumstances of this case, that the error, if any, in his hearing of the tapes was harmless beyond a reasonable doubt.

III.

NO EVIDENCE OF JUDICIAL PREJUDICE

That any alleged Judicial Prejudice by the trial court as to said tapes were known to the wife, prior to the trial of this cause.

The wife knew the trial court heard the tapes prior to said trial and consented thereto. Nevertheless, if the prejudice alleged by the Petitioner existed, she could have obtained a change of venue from the trial court prior to said trial, pursuant to Indiana Rules of Procedure. Stein v. State (1975), ___Ind. App.___ 334 N.E. 2d 698.

In other words prejudice must be shown by trial court's conduct; it may not be presumed or inferred from subjective views of the Judge and in support of this position, the Appellee calls the court's attention to the case of Kleinrichert v. State (1973), 260 Ind. App. 537, 292 N.E. 2d 277, wherein the court made the following statement:

> "It is presumed that a trial judge who is sitting as the trier of facts is able to correctly determine what may be properly considered in rendering a judgment. We cannot assume prejudice or infer it from the subjective views of the trial judge. In United States v. Bolden (7th Cir. 1965), 355 F. 2d 453, 456, the court stated that:
>
> ". . . . . Trial judges are invariably called upon to conduct impartial trials despite whatever opinion they may have or which they may formulate during the course of the trial concerning the guilt or innocence of an accused. Such impartiality is precisely what is expected of them, and an experienced trial judge must be assumed capable of performing his essential function. In short, prejudice must be shown by trial conduct; it may not be presumed or inferred from the subjective views of the judge."

The Supreme Court of Indiana, in it's opinion, Appendix A, Page 19 made the following statement as to any prejudice of trial court:

"Without the transcription of these tapes before us to demonstrate their supposed prejudice, the presumptions in favor of the trial court's judgment apply in full force, and we must agree, in light of all the circumstances of this case, that the error, if any, in his hearing of the tapes was harmless beyond a reasonable doubt."

IV.

CONTENTS OF TAPE NOT SET OUT IN RECORD OF PROCEEDINGS

As to the admission of Respondent's Exhibit 8, the same being a purported magnetic tape on a reel containing approximately five (5) hours of a voice-recorded telephone conversations between the Petitioner and various other persons was contained in the purported transcript at page 678.1 of Transcript of Proceedings. Said tape has not been transcribed nor has the said contents of said tape been reduced to a statement of the evidence or proceeding, and made a part of the record as provided by AP. 7.2 (c), or in the Brief of the Petitioner, and therefore, no question has been preserved.

In Indiana the well settled rule of law is where the Appellant raises certain issues dealing with the contents of the evidence and the evidence is not in the record, then the court cannot consider the issues raised and must affirm the judgment of the trial court. Altheide v. O'Calloghan (1966) 140 Ind. App. 240, 212 N.E. 2d 794; Findling v. Findling (1963), 134 Ind. App. 661; 186 N.E., 2d 892; Auto Owners Ins. Co. v. Buckeye Union Casualty (1962), 133 Ind. App. 379, 182 N.E. 2d 429; Chicago National Life Ins. Co., et al v. Sollman (1933) 99 Ind. App. 686; 187 N.E. 686.

There are two Indiana decisions which are precisely on point. First, in King v. State, (1957) 236 Ind. 268, 139 N.E. 2d 547, the defendant on appeal claimed that a confession taken from him and tape recorded was not freely given and was coerced from him; the court confirming his

confession states:

"The mere fact that a confession has been made while an accused is in custody does not render it inadmissible in the absence of evidence of coercion, even in the trial, to say nothing of a grand jury inquest.

We further point out that the contents of tape recordings are not in the bill of exceptions or record before us. We do not know that they were confessions, mere denials of guilt or a complete statement of any defense he might have had. There is no evidence of any force threats or violence imposed upon the appellant when the recordings were made. Therefore, we cannot conclude in the absence of their contents that prejudicial error was committed. (our emphasis)

Secondly, In Dwyer v. McClean (1961) 133 Ind. App. 454, 175 N.E. 2d 50 the defendant brought an appeal from an adverse judgment entered upon a complaint for malicious prosecution and he contended that certain conversations on phonograph records were erroneously placed into evidence.

In affirming the trial court's decision, the Appellate Court held:

"Appellant further urges us that the court erred in admitting into evidence plaintiff's Exhibits Numbers eight (8) through twenty-six (26), inclusive. These exhibits were flat round discs which were used for the recording of certain telephone conversations. They were introduced in evidence and played to the jury. Appellant's objection was based on the ground that the material contained in such discs was not germane or relevant to the issues. We must point out that the contents of the discs are not in the bill of exceptions of record before us. We therefore, cannot conclude in the absence of their contents that prejudicial error was committed."

King v. State (1956) 236 Ind. 268, 139 N.E. 2d 547. The Dwyer case is exactly the same facts as now before this court.

In the case of Miles v. State of Indiana (1972)___ Ind. App.____; 284 N.E. 2d 551, the Court made the following

statement:

> "As we only have before us conflicting versions of counsel as to the evidence at the trial, we must reaffirm the requirement of the foregoing cases that a transcript of the evidence, or an approved statement pursuant to Rule AP 7.2 (A) (3) (C), be included in the record if a question is to be presented on review as to the sufficiency of the evidence to sustain a conviction. Otherwise, we become mere gazers into a crystal ball."

V.

THERE IS NO FEDERAL QUESTION PRESENTED BY PETITIONER

Said tapes were first objected to by Petitioner in Trial Court, then they agreed and consented to said tapes being admitted into evidence.

On Page 5 of Respondent's Appendix A beginning at Paragraph 2, the Indiana Supreme Court found and stated:

On November 25, 1975, the trial court considered Mrs. Lopp's Petition for Rehearing, and overruled her husband's motion to dismiss it. A hearing was then held, specifically on the issue of the alleged fraud and coercion in the procurement of the provisional custody orders. During cross-examination of Mrs. Lopp, her husband's attorney asked that the tapes be admitted. The wife's attorney, Mr. Grove, objected on the basis of 18 U.S.C. §2515 (1970). The trial judge stated that he had opposing briefs by the parties, including conflicting federal circuit opinions on the question of the admissibility of wiretaps in marital proceedings, and states, "I'm prepared to overrule the objections to the tapes. If I'm wrong, I'll be reversed. If I rule otherwise and I'm wrong, I'll be reversed. If I rule otherwise and I'm wrong, I'd be reversed, so my best judgment is that my chances are better." There were further objections by the wife's attorney, relating to the disclosure of the names of third parties that might be involved by admitting the tapes. The court then states, "Now, I'm just down here to try this case. Everyone in this courtroom knows who you're talking about by myself, and I'm the one who has to decide it." Husband's attorney then cross-examined Mrs. Lopp about the contents of the tape. Her attorney made foundation objections, saying that he had not reviewed the tapes, and questioned their accuracy. The following colloquy then took place between the court and wife's attorney:

> THE COURT: Well, now let me see where I am on this. She's testified that one of the reasons that she signed this was that she was afraid that the tapes would be made available to a former husband or something. Is that right?
>
> MR. GROVE: That's correct. It was her testimony, yes.
>
> THE COURT: And they're questioning whether or not playing those tapes was sufficient to intimidate her to get her to do it. Now, how am I going to know unless I hear the tapes: If that's going to be part of your evidence, then do I take your word for it, or am I supposed to hear the tapes? What's your position on that?
>
> MR. GROVE: No, may I say to the Court that we have no objection if the Court does hear the tapes under any circumstances, under the appropriate rules, as a matter of fact, either by way of incamera proceedings or anything else. I'm not sure what the state of the law is. Not that I'm questioning the Court's ruling. We don't have any objection if the Court listens to the tapes, either in incamera proceedings or anything else, to help you decide. That is not the basis. I object to the format by which they are attempting to cross-examine her as to the subject matter. And because of the many questions in my mind, if the Court wishes, out of the presence of both attorneys and parties, to listen to the tapes, I have no objection whatsoever. Except, I cannot verify . . . I can't say and I don't know that my client can say that

they have not been tampered with in some way, there's no evidence.

THE COURT: Of course, I certainly wouldn't listen to them without the presence of both attorneys on either side. That's part of it. I personally would rather not listen to them, if I had a preference on it.

MR. GROVE: . . . (we) have no objection as long as there are appropriate orders to protect the parties.

The trial court then impounded the tapes, at the conclusion of this hearing, and took the Petition for Rehearing under advisement along with the parties' briefs on the subject.

On December 3, 1975, after listening to the tapes, the trial court overruled Mrs. Lopp's Petition for Rehearing and motion to overrule the provisional orders of September 23 and September 30.

The final hearing on this case was opened before the trial judge on December 10, 1975. The court ordered all of the testimony and evidence from the prior hearing, which was already before the court, to be incorporated into the present hearing. During the testimony, the husband's attorney offered the tapes into evidence. The wife's attorney objected on the grounds previously raised. The trial court then admitted the tapes, marked as Petitioner's Exhibit #8, into evidence. This ruling was made on the basis of the court's two previous rulings of admissibility of the tapes, both at the former hearing and the ruling on the incorporation of all the former hearing evidence in the present hearing. The tapes were never read or transcribed into the record. Nor did the trial court hear the tapes again. Rather, they were admitted because the judge had already heard them, and so that they could be marked for reference purposes during witness testimony. (Respondent's Appendix A, Page 7)

It appears from the above opinion of the Indiana Supreme Court that the Petitioner made no objection to said tapes and consented to said evidence, and for this reason presented no question to the Trial Court, Indiana Supreme

Court or to this Court as to violation of said statute.

After the horse is out of the barn (door opened by Petitioner), and as an after-thought, they want to make an issue of evidence they consented to and was brought about by their own making.

The Indiana Supreme Court in it's opinion found and made the following statement in further explanation of Trial Court's position, and its own, as to said tapes. (Respondent's Appendix A, Page 14, Paragraph 2)

> The record is clear that the tapes were listened to by the trial court for the purpose of deciding the question of fraud and coercion in the procurement of the provisional custody orders of September 23 and September 30. This question of fraud and coercion was brought forward by Mrs. Lopp, after she had signed the orders, and the first hearing in this case was specifically had on that issue. Thus, at the time the trial court had to decide the fraud question, he had two contradictory representations of Mrs. Lopp herself: her signature on the provisional custody agreement, with the statement there that she had advisedly and freely and voluntarily entered into it, and her present claim and testimony that her will had been overborne by fraud and coercion tantamount to blackmail. The claim of fraud and coercion was based on the existence of the tapes of Mrs. Lopp's phone conversations, which evidence the trial court correctly observed that he had only the representations of the attorneys about. Mrs. Lopp did not object to the trial court hearing the tapes for this purpose. The trial court then heard the tapes, which were never transcribed into the record. We doubt that Mrs. Lopp would still be objecting to the admission of the tapes, had the trial court in fact found that their subject matter was such as could have overborne her will.

CONCLUSION

Wherefore, Respondent respectfully submits that

petitioner's alleged issue has been adequately disposed of pursuant to state grounds, and that her Petition for Writ of Certiorari should be disallowed.

Respectfully Submitted,

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Jack N. VanStone
Member of the bar of the Supreme Court
of the United States and Council upon
whom service is to be made.

APPENDIX A

IN THE

SUPREME COURT OF INDIANA

IN RE THE MARRIAGE OF	)	
	)	
JUDITH GAYLE LOPP,	)	
	)	
Respondent-Appellant,	)	
	)	
and	)	No. 778 S 145
	)	
JAMES D. LOPP, Jr.,	)	
	)	
Petitioner-Appellee.	)	

APPEAL FROM VANDERBURGH SUPERIOR COURT
The Honorable Lester Nixon, Special Judge

ON PETITION TO TRANSFER

PIVARNIK, J.

This case comes to us on a transfer petition from the Court of Appeals, First District. The Vanderburgh Superior Court entered a judgment, on December 22, 1975, dissolving the marriage of the parties, husband James Lopp Jr. and wife Judith Lopp. At the same time, the trial court ordered a division of the parties' property and awarded the husband permanent custody of their minor child, James Lopp III. On appeal, the judgment of the trial court was reversed. *In re Marriage of Lopp*, (1977) Ind. App., 370 N.E. 2d 977. Husband James Lopp Jr. petitions this court to transfer this case and to set aside the judgment of the Court of Appeals.

The principal question for our review is whether the trial court's admission into evidence of tape recordings of wiretapped telephone conversations mandates reversal of this case. An examination of this question requires a close look at the sequence and context of events, surrounding the admission of these tapes, at the trial court.

The husband, James Lopp Jr., an attorney, and the wife, Judith Lopp, were married on January 9, 1971. They had one child, James Lopp III. Also, Mrs. Lopp had custody of her two children from a previous marriage.

Mr. Lopp subsequently became suspicious of his wife's activities. On September 20, 1975, Mr. Lopp attached a self-activating tape recorder to his home phone, without the knowledge of his wife. This device recorded all telephone conversations, and the tape recordings acquired in this manner apparently confirmed Mr. Lopp's suspicions that his wife was seeing another man.

On September 22, 1975, the couple became involved in a domestic crisis and separated. On this date husband James Lopp confronted his wife Judith with tape recordings of telephone conversations allegedly between her and various other parties. Mr. Lopp took physical custody of their son, James Lopp III, on this date, and moved out of the marital home.

On September 23, 1975, Judith Lopp went to her husband's law office. Her father-in-law, James Lopp Sr., also an attorney, informed her that if she did not consent to give her husband temporary custody of their son James until this conflict was resolved, he would phone her former husband, inform him of the tapes and their contents, and she could possibly lose custody of all three of her children. Judith then signed an agreed provisional order which stated, in relevant part:

> "Comes now the Husband in the above matter and files his petition for custody of parties' minor child, and comes now the wife and the parties agree as follows:
>
> 1. That the husband shall have the care, custody and control of the parties' minor child, James Daniel Lopp,

> III, provided, however, the Wife shall have temporary custody of said child at reasonable times.
>
> And the Court now approves the agreement of the parties and the same is now so ORDERED.
>
> ....
>
> I have read the above order and being advised of my rights to an attorney, freely and voluntarily consent and approve said order.
>
> /S/ Judy Lopp
> Wife"

On this same date, husband James Lopp Jr. filed both a Petition for Dissolution of Marriage, and a Motion for Temporary Custody of Parties' Minor Child. This motion for temporary custody, as quoted above and signed by Judith Lopp, was approved and ordered by the trial court.

On September 29, 1975, after Judith Lopp talked to an attorney, she filed a Petition for Relief which asked for temporary custody of the parties' child, adequate support, possession of the parties' home, and an order restraining Mr. Lopp from interfering with her quiet enjoyment of the home. This petition also alleged that Mrs. Lopp had been coerced into agreeing that her husband should have custody of their child.

On September 30, 1975, after a meeting between wife, husband, his father, and her attorney, the trial court approved the substance of the September 23 agreement between the couple, along with other provisions. The pertinent part of this court-approved agreement, as ordered and certified into the record, was as follows:

> "Comes now the husband by his attorney, Glenn A. Grampp, and comes now the wife by her attorney, David Kelley, and the wife's petition coming on for hearing, the parties agree as follows:

1. That the husband shall have the care, custody and control of the parties' minor child, James Daniel Lopp, III, provided however, the wife shall have the privilege of seeing and visiting the parties' minor child, one day a week from 9:00 A.M. to 5:00 P.M.

. . . .

This agreement is entered into freely and voluntarily without coercion or duress and with the wife being advised by her attorney, and having full knowledge of all the facts.

And the court now approves the agreement of the parties and the same is now so ordered."

On October 3, 1975, Judith Lopp filed a Petition for Rehearing with the trial court, in which she asked the court for a new hearing on the issue of her son's custody. Alleging that the two previous court-approved custody agreements were not voluntarily agreed to by her, Mrs. Lopp's petition stated that:

> "[B]oth of her agreements herein were wrung from her by threats and coercion in that she was threatened with publication of several of her private phone calls which were recorded without her knowledge by her husband, she was threatened with total loss of her said child, her former husband, James Forman, was subpoened to the hearing and she was threatened with the influence of her husband on transferring custody of her two daughters to said James Forman. Affiant further says that she has been subjected to the Lopp infallibility in the field of law and intimidated by the assertion of her husband and his father of their influence over the courts of this area. Affiant further says that she was advised by her lawyer, David O. Kelley, not to agree but at the conference she agreed to the custody in her husband which was held in her husband's office where she feared for her children and their future as a family with

> her because of the coercion, intimidation and threats aforesaid."

Subsequent to this petition, the regular trial court judge relinquished jurisdiction and a special judge was named. Further motions and petitions were filed by the parties, including a motion by Mr. Lopp to dismiss his wife's Petition for Rehearing. The trial court took the entire matter under advisement.

On November 25, 1975, the trial court considered Mrs. Lopp's Petition for Rehearing, and overruled her husband's motion to dismiss it. A hearing was then held, specifically on the issue of the alleged fraud and coercion in the procurement of the provisional custody orders. During cross-examination of Mrs. Lopp, her husband's attorney asked that the tapes be admitted. The wife's attorney, Mr. Grove, objected on the basis of 18 U.S.C. §2515 (1970). The trial judge stated that he had opposing briefs by the parties, including conflicting federal circuit opinions on the question of the admissibility of wiretaps in marital proceedings, and stated, "I'm prepared to overrule the objections to the tapes. If I'm wrong, I'll be reversed. If I rule otherwise and I'm wrong, I'd be reversed, so my best judgment is that my chances are better." There were further objections by the wife's attorney, relating to the disclosure of the names of third parties that might be involved by admitting the tapes. The court then stated, "Now, I'm just down here to try this case. Everyone in this courtroom knows who you're talking about but myself, and I'm the one who has to decide it." Husband's attorney then cross-examined Mrs. Lopp about the contents of the tape. Her attorney made foundation objections, saying that he had not reviewed the tapes, and questioned their accuracy. The following colloquy then took place between the court and wife's attorney:

> THE COURT: Well, now, let me see where I am on this. She's testified that one of the reasons that she signed this was that she was afraid that the tapes would be made available to a former husband or something. Is that right?

MR. GROVE: That's correct. It was her testimony, yes.

THE COURT: And they're questioning whether or not playing those tapes was sufficient to intimidate her to get her to do it. Now, how am I going to know unless I hear the tapes: If that's going to be part of your evidence, then do I take your word for it, or am I supposed to hear the tapes? What's your position on that?

MR. GROVE: No, may I say to the Court that we have no objection if the Court does hear the tapes under any circumstances, under the appropriate rules, as a matter of fact, either by way of incamera proceedings or anything else. I'm not sure what the state of the law is. Not that I'm questioning the Court's ruling. We don't have any objection if the Court listens to the tapes, either in in camera proceedings or anything else, to help you decide. That is not the basis. I object to the format by which they are attempting to cross-examine her as to the subject matter. And because of the many questions in my mind, if the Court wishes, out of the presence of both attorneys and parties, to listen to the tapes, I have no objection whatsoever. Except, I cannot verify . . . I can't say and I don't know that my client can say that they have not been tampered with in some way, there's no evidence.

. . .

THE COURT: Of course, I certainly wouldn't listen to them without the presence of both attorneys on either side. That's part of it. I personally would rather not listen to them, if I had a preference on it.

. . .

MR. GROVE: . . . [We] have no objection as long as there are appropriate orders to protect the parties.

The trial court then impounded the tapes, at the conclusion of this hearing, and took the Petition for Rehearing under advisement along with the parties' briefs on the subject.

On December 3, 1975, after listening to the tapes, the trial court overruled Mrs. Lopp's Petition for Rehearing and motion to overrule the provisional orders of September 23 and September 30.

The final hearing on this case was opened before the trial judge on December 10, 1975. The court ordered all of the testimony and evidence from the prior hearing, which was already before the court, to be incorporated into the present hearing. During the testimony, the husband's attorney offered the tapes into evidence. The wife's attorney objected on the grounds previously raised. The trial court then admitted the tapes, marked as Petitioner's Exhibit #8, into evidence. This ruling was made on the basis of the court's two previous rulings of admissibility of the tapes, both at the former hearing and the ruling on the incorporation of all the former hearing evidence in the present hearing. The tapes were never read or transcribed into the record. Nor did the trial court hear the tapes again. Rather, they were admitted because the judge had already heard them, and so that they could be marked for reference purposes during witness testimony. The final hearing then proceeded, at which an exhaustive amount of evidence was admitted concerning the relationship of these parties, their finances and property, and their fitness for custody, including evidence of events as described in *In re Marriage of (Forman) Lopp*, (1977) Ind. App., 362 N.E. 2d 492, a case dealing with a custody modification petition from Mrs. Lopp's former divorce decree.

On December 22, 1975, the trial court issued its judgment and findings, dissolving the marriage of the parties and dividing their assets. Custody of the parties' minor son, James Lopp III, was granted to the husband, with provisions for visitation granted to Mrs. Lopp.

A Motion to Correct Errors was filed by Mrs. Lopp on

February 20, 1976. Specifications nos. 6 and 9 of this motion alleged error in the admission of the tape recordings. The trial court overruled this motion on March 3, 1976, which judgment stated as follows:

> "This cause comes before the Court on the Motion to Correct errors of the Respondent and Cross-Petitioner filed on February 20, 1976, and now the Court having considered said motion,
>
> "FINDS that the error, if any, in the admission into evidence of the matters complained of in specifications 6 and 9 of the Respondent and Cross-Petitioner's said motion constituted at most harmless error under the provisions of Trial Rule 61 of the Indiana Rules of Civil Procedure inasmuch as the evidence was merely cumulative and did not affect the substantial rights of the parties.
>
> "And now the Court having reviewed the evidence concludes that the decision and judgment of the Court on all issues is sustained by substantial evidence even to the exclusion of the evidence complained of in specifications 6 and 9 of Respondent and Cross-Petitioner's Motion to Correct Errors, and the Court hereby reaffirms the judgment entered in this cause on the 22nd day of December, 1975.
>
> "IT IS THEREFORE, ordered, adjudged and decreed by the Court that the Respondent and Cross-Petitioner's Motion to Correct Errors is overruled."

In the Court of Appeals opinion in this case, it was held that the trial court abused its discretion and committed reversible error by its admission into evidence of the tape recordings of the wife's telephone conversations. It was held specifically that the husband's conduct in placing the wiretap was proscribed conduct within the meaning of federal wiretap laws, 18 U.S.C. §2510 *et. seq.* (1970), and that the exclusionary rule of such statute thus applied. *Lopp, supra,* 370 N.E. 2d at 981. As against the husband's argument that the admission was harmless error, the Court of Appeals stated that the fruits

of an illegal search are not admissible and that the trial court has no discretion to exercise in the admission of illegally obtained wiretap information. *Id.* at 982. The Court of Appeals also discussed the right to privacy, and as another rationale for its decision stated:

> "We hold that a spouse may not obtain evidence through an illegal wiretap, wield that evidence as a sword in a domestic relation action, and then hide behind that same marital status to justify the use of his illegally obtained evidence."

Id. at 981. Thus, the opinion seems to have been based not only on the court's reading of the federal statutes, but also on public policy grounds. The case was then reversed and remanded for new determinations of the custody and property settlement issues, which issues were raised but not decided by the Court of Appeals in view of its disposition of the wiretap issue. Other evidentiary issues in this case were decided by the Court of Appeals, however, including a specific finding against the wife on her claim that the trial court's provisional orders were obtained under duress and fraud. The Court of Appeals found that the evidence was sufficient to sustain the trial court on this point. *Id.* at 983.

The husband's transfer petition to this court alleges several errors in the above opinion of the Court of Appeals. Chiefly, he argues that the federal wiretap statutes are not applicable to this case, and also reasserts his harmless error and cumulative evidence arguments. Contrary to the Court of Appeals' allusions to the wife's right of privacy, he argues that the Court of Appeals decision violates his right of privacy in his own home. He also, in his brief, says that the Court of Appeals could not have ruled on the cumulativeness of the tapes unless they "gazed into a crystal ball," since they did not say that they heard the tapes. Against this argument, the wife argues here that it is "beyond the realm of possibility" that the trial court was not prejudiced by listening to the tapes. We are thus faced with more than a few incredible arguments and novel constitutional questions, concerning the

construction of a federal statute, federalism, and rights of privacy, the upshot of which has been attempts, on both sides since the beginning of this case, to goad a trial court judge into error in a dissolution proceeding by reference to a mysterious evidentiary quantity about which the law is totally uncertain.

While we do not endorse all the claims of the husband, or his conduct, we grant transfer and reverse the opinion of the Court of Appeals, insofar as it held that the trial court's action mandates reversal of this case. Our holding is strictly limited to the particular facts and circumstances surrounding the admissibility of these tapes in this trial, as outlined above and discussed subsequently. In essence, we do not see how any more evidentiary hearings can further either justice to these parties or the best interest of their child, in view of the substantial evidence already heard. We hold that the trial judge ruled prudently concerning the tapes, and acceed to his judgment on disputed questions of fa t. Also, we believe that the Court of Appeals, in relation to these facts and circumstances, fashioned an evidentiary policy which actually supports the trial judge's conduct.

The center of the legal controversy here is the applicability of the federal wiretap statutes, 18 U.S.C. §2510 *et. seq.* (1970) to the present dissolution of marriage proceeding. Section 2511 of the statute is a criminal sanction against any person who wilfully intercepts, uses, or discloses illegal wiretaps and illegal oral communication interceptions. Section 2515 of the statute, which is the part chiefly in issue here, is an exclusionary rule relating to such evidence which states as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that

> information would be in violation of this chapter."

Another part of the statute, §2520, provides for recovery of civil damages by those who have been illegally wiretapped against those who have so violated their privacy. The legislative history of these statutes states that Congressional power in this area is founded on the power to regulate interstate commerce, and that the sanctions in the act are designed to protect privacy. *See* 1968 U.S. Code Cong. & Admin. News 2177-97. This history also states that the exclusionary rule of §2515 was meant to apply in both federal and state proceedings, and is not meant to be limited to criminal proceedings. *Id.* at 2185. There have been no comparable statutes on wiretap activities passed by the legislature of this state.

Several courts have considered whether or not, as a matter of statutory construction and legislative intent, these federal statutes apply to electronic surveillance between married persons. The most celebrated cases on this question are *Simpson v. Simpson*, (5th Cir. 1974) 490 F. 2d 803, *cert. denied*, (1974) 419 U.S. 897, 95 S. Ct. 176, 42 L. Ed. 2d 141, and *United States v. Jones*, (6th Cir. 1976) 542 F. 2d 661. *Simpson* was a suit for civil damages, by a wife who was wiretapped by her husband, which held that these statutes did not apply to interspousal wiretapping. *Jones* reached the opposite conclusion, in a federal criminal prosecution against a husband who intercepted telephone communications of his wife, from whom he was then separated. The United States Supreme Court has not spoken directly to this question, and the division of opinion is reflected in other federal cases. *See Anonymous v. Anonymous*, (2d Cir. 1977) 558 F. 2d 677, *aff'g London v. London*, (S.D.N.Y. 1976) 420 F. Supp. 944 (dismissing a civil suit by wife against husband who had wiretapped her); *United States v. Schrimsher*, (5th Cir. 1974) 493 F. 2d 848 (upholding a criminal prosecution of a man who wiretapped his former lover); *Remington v. Remington*, (E.D. Pa. 1975) 393 F. Supp. 898 (denying motion to dismiss civil suit brought by husband who had been wiretapped by his wife and others).

On the precise question of the applicability of §2515, the exclusionary rule of the federal wiretap statutes, there is

a similar dearth of authority and division of opinion. In *Beaber v. Beaber*, (C.P. Stark Co. 1974) 41 Ohio Misc. 95, 322 N.E. 2d 910, a trial judge held that neither the federal wiretap statutes nor the right of privacy under the United States Constitution prevented him from listening to a husband's wiretapping of a wife's telephone conversations in the marital home. The court reasoned, in this divorce proceeding wherein child custody was in issue, that he was only listening to the tapes for impeachment purposes. On the basis of other evidence before him, the judge thought that the husband was in an "indefensible position" without the tapes, since the husband's testimony alone seemed "almost unbelievable" until the tapes were admitted, which tapes vindicated him and "completely obliterated" the otherwise believable testimony of his wife. *Id.*, 41 Ohio Misc. at 97, 103, 322 N.E. 2d at 912, 915. The trial judge's opinion was affirmed in an unpublished opinion by the Ohio Court of Appeals, *Beaber v. Beaber*, No. 4187 (Ohio App., 5th Dist., Aug. 4, 1975). The Ohio Court of appeals also saw the question as one of admitting the wiretaps solely for purposes of impeachment, upon the issue of witness credibility relative to alleged perjury in fraudulently obtaining a court order, rather than as a question of using such wiretaps as substantive proof in the case, absent perjury. *Id.*, slip op. at 14-15. The court concluded, after recognizing the federal line of authority that otherwise unconstitutional evidence can be used for impeachment purposes, that:

> "The law has justice not injustice as its purpose. Justice not injustice is the end sought by the United States Constitution, the Constitution of the State of Ohio, and by the laws of the United States, of the State of Ohio, and the Courts. Although under some other circumstances the tapes might be constitutionally inadmissible or their admission might be prohibited by statute, under the facts of the instant case there can be no justification for permitting the plaintiff to turn the method by which the tapes were obtained to her own advantage, and thus provide herself with a shield against contradiction of her own untruths."

Id., slip op. at 17-18. Although the *Beaber* courts discussed issues similar to the question of the applicability of 18 U.S.C. §2515, unfortunately, that exclusionary rule section of the federal wiretap statute was not cited or discussed in their opinions. Section 2515 was cited and discussed briefly by the Florida courts in *Markham v. Markham*, (Fla. App. 1972) 265 So. 2d 59, *aff'd*, (Fla. 1973) 272 So. 2d 813. This case was a dissolution of marriage action, in which the husband offered wiretaps of telephone conversations of his wife on the issue of temporary custody of the children. The trial court did not think that the federal statutes necessitated an exclusion of this evidence, but this decision was held reversible at both levels of state appellate review. It was agreed that the general right of privacy of persons was a matter of state, not federal, law. *Id.*, (Fla. App.) 265 So. 2d at 60-61. However, it was found that both the Florida Constitution and the applicable statutes of Florida prohibited the use of such evidence as a matter of state law. *Id.*, (Fla. App.) 265 So. 2d at 61-62; (Fla.) 272 So. 2d at 814. The same result was reached in the North Carolina case of *Rickenbaker v. Rickenbaker*, (1976) 28 N.E. App. 644, 222 S.E. 2d 463, *aff'd*, (1976) 290 N.C. 373, 226 S.E. 2d 347. In this case, a husband who was no longer living in the marital home wiretapped his wife, who was still living there, and attempted to admit such evidence in a divorce action where child custody was in issue. The state appellate courts both construed §2515, holding that it clearly prohibited the use of wiretapping in evidence, in the case at hand, and that this federal law was binding on state judges. *Id.*, 28 N.C. App. at 647-48, 222 S.E. 2d at 465; 290 N.C. at 381-82, 226 S.E. 2d at 352-53. In our own state, the first time that §2515 has ever come into question is in the present case, and the only opinion on it is that of the Indiana Court of Appeals here under review.

A review of all the above authority leads to two conclusions pertinent to the case before us. First, the precise question which we face has not yet been decided by any other court. That question, as we see it, is whether or not wiretapped telephone conversations are admissible in a marital action wherein it is claimed that they have been used to coerce or

blackmail a party into a court-approved agreement, thereby also defrauding the court. This is thus a different question, of statutory interpretation and legislative intent, from the more general question of whether §2515 can be construed to mandate exclusion of wiretaps as substantive proof on the merits of the controversy. Seen in this light, the present question is most analogous to that faced by the Ohio courts in *Beaber, supra,* wherein it was only decided whether the tapes could be used for impeachment purposes as to alleged perjury in attempting to obtain a court order. Our second conclusion, drawn from the authorities, is that questions of federalism are necessarily involved in any application of §2515 to marital actions. This is because both the clear language and legislative history of the statute arguably foreclose *any* exceptions to its rule, as a matter of statutory interpretation. As phrased in *Anonymous, supra,* 558 F. 2d at 677, "The issue becomes at what point interspousal wiretaps leave the province of mere marital disputes, a matter left to the states, and rise to the level of criminal conduct prescribed by the federal wiretap statutes." The issue was also seen in this light by Circuit Judge Bell, now the United States Attorney General, in *Simpson, supra,* 490 F. 2d at 805, though he purportedly resolved this underlying question of federalism as a matter of statutory interpretation.

On the question of statutory interpretation before this court, we find that §2515 would lead to an illogical and absurd result if read to mandate reversal of the present case. The record is clear that the tapes were listened to by the trial court for the purpose of deciding the question of fraud and coercion in the procurement of the provisional custody orders of September 23 and September 30. This question of fraud and coercion was brought forward by Mrs. Lopp, after she had signed the orders, and the first hearing in this case was specifically had on that issue. Thus, at the time the trial court had to decide the fraud question, he had two contradictory representations of Mrs. Lopp herself: her signature on the provisional custody agreement, with the statement there that she had advisedly and freely and voluntarily entered into it, and her present claim and testimony that her will had been

overborne by fraud and coercion tantamount to blackmail. The claim of fraud and coercion was based on the existence of the tapes of Mrs. Lopp's phone conversations, which evidence the trial court correctly observed that he had only the representations of the attorneys about. Mrs. Lopp did not object to the trial court hearing the tapes for this purpose. The trial court then heard the tapes, which were never transcribed into the record. We doubt that Mrs. Lopp would still be objecting to the admission of the tapes, had the trial court in fact found that their subject matter was such as could have overborne her will.

The Court of Appeals has stated in this case that a spouse should not be able to wield illegal wiretaps "as a sword in a domestic relation action," and then be able to hide behind the marital status that he has wielded the sword against to justify the admission of such evidence. *Lopp, supra,* 370 N.E. 2d at 981. However, if this statement is either correct as an interpretation of the federal wiretap statutes, or laudatory as an expression of state judicial policy, it actually supports the action of the trial judge in this case. He specifically heard the tapes because of allegations that the husband had improperly wielded this evidence in order to gain the wife's assent to custody orders. The trial judge was thus actually trying to prevent the kind of overreaching about which the Court of Appeals is concerned. An exclusionary rule, which would prevent the hearing of the tapes even for this purpose, would not necessarily prevent the use of wiretapped private phone conversations for blackmail. Even if the tapes are inadmissible as evidence in a courtroom, they could be used in other ways that might coerce a person into signing a court agreement. In the present case, for instance, Mrs. Lopp was purportedly afraid that her former husband would have access to the tapes. If the tapes were thus inadmissible for purposes of showing the subtance of such fraud and coercion, the person they were used against would be left without anything, other than his own testimony, with which to evidence the coercion before the court. It is unfortunate that electronic surveillance equipment can be used for such purposes generally in society, but as long as this equipment is in existence a blanket evidentiary

exclusionary rule cannot prevent all possible abuse. On the other hand, if the type of blackmail alleged here is to be guarded against when court orders relating to custody are at stake, the tapes must be admissible to evidence such fraud. Otherwise, the trial judge would have only the representations of the parties and their attorneys on which to base a decision. In such event, a spouse could claim coercion and defraud the judge by merely wielding harmless, or even blank tapes, which the judge could not hear. It is a well established principle of statutory interpretation that if a statute is open to two interpretations, the presumption is that the legislature intended the more reasonable of the two, for the legislature cannot be presumed to have expected that a statute be applied in an illogical and absurd manner. *See, e.g., Kerlin's Lessee v. Bull,* (1786) 1 U.S. (1 Dall.) 175, 1 L.Ed. 88; *Pryor v. State,* (1973) 260 Ind. 408, 296 N.E. 2d 125; *In re Adoption of Jackson,* (1972) 257 Ind. 588, 277 N.E. 2d 162. Even if we ascribe to the national Congress, in the enactment of §2515 and other federal wiretap statutes, a legislative purpose of preventing wiretap abuse in domestic relations matters, *see Jones, supra,* 542 F. 2d at 668-71, that purpose is in fact hindered by the application of §2515 to mandate reversal of this case. Thus in view of all the facts and circumstances herein, we hold the action of the trial judge in this case to be proper, and not reversible error. We believe that the other interpretation urged by Mrs. Lopp on appeal, leads to an illogical and absurd result which we presume that the national Congress did not intend.

Underlying the decision we reach is a consideration of due process. Certainly, it is essential in custody determination that agreements between parties before the court, given the trial judge's approval and entered as his orders, be freely agreed to as expressions of the parties' intent, and not be the product of fraud and blackmail. Our trial rules provide for relief from court orders and judgments on the basis of "fraud, misrepresetation, or other misconduct of an adverse party." Ind. R. Tr. P. 60 (B) (3). As stated by the Ohio Court of Appeals, the end sought by both state and federal constitutions and statutes is justice, not injustice. *Beaber,* (Ohio App.), *supra,* slip op. at

17-18. *See also* U.S. Const. amend. V, amend. XIV: Ind. Const. art. 1, §12. Further, the type of order involved here, of child custody, is a special concern of the trial judge apart from the interests, selfish or otherwise, of either the husband or wife in a dissolution proceeding. The trial judge has the responsibility to assure that such orders are entered in accordance with the best interests of the child. Ind. Code § 31-1-11.5-21 (Burns Supp. 1975); *Schwartz v. Schwartz,* (1976) Ind. App., 351 N.E. 2d 900, 901. It cannot be seriously claimed that a fraudulently procured custody order, if such were in fact the case, furthers either the best interest of the child or an orderly process for a determination of what that interest is. We thus, in the present situation, feel that to the extent §2515 can be read to the contrary, it would be an unconstitutional impairment of an integral and essential function of state court judges, the entering of efficacious orders, free of fraud, which function here is related to a service traditionally performed by state judges and expected of them by their legislatures and citizens, the providing for the best interests of the children in domestic relations disputes. *See National League of Cities v. Usery,* (1976) 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245, construing U. S. Const. amend X. We seriously doubt, however that the national Congress intended such an interpretation and application of §2515. Since another part of the federal wiretap statute, §2520, provides for civil damages for persons aggrieved by electronic surveillance, the federal courts in such a case would presumably be compelled to listen to the wiretaps, to prove their existence, as an essential element of the case. That function is directly analogous to the purpose for which the trial judge listened to the tapes in this case.

We also do not agree that the trial judge's later admission of the tapes at the final hearing mandates reversal of this case. At the time of the final hearing, the tapes had already been admitted for a proper purpose, and for a purpose which Mrs. Lopp did not object to. The trial judge had already listened to them, and it was not suggested by anyone that he disqualify himself from the case for this reason. It is clear that the tapes were only readmitted as part of a general order to incorporate

all evidence already before the court into the final hearing, and for purposes of marking them as an exhibit in the case. The trial judge did not listen to the tapes again, nor were they read or transcribed into the record. Finally, the trial judge made two specific findings of fact on this question: that the tapes were merely cumulative and did not affect the substantial rights of the parties, thus constituting harmless error under Ind. R. Tr. P. 61, and that the final judgment on all issues was sustained by substantial evidence even to the exclusion of the tapes. In addition to these findings, the trial judge had previously found against the wife on her claim of fraud and coercion, toward which claim the substance of the tapes was supposedly probative. The Court of Appeals in this case has specifically affirmed the trial court on this finding of fact. *Lopp, supra,* 370 N.E. 2d at 983. This holding of the Court of Appeals is consistent with the principle that in reviewing actions of a trial court, we neither weigh the evidence nor determine the credibility of witnesses. *B & T Distributions, Inc. v. Riehle,* (1977) Ind. , 366 N.E. 2d 178, 180; *Lake County Council v. Arredondo,* (1977) Ind. , 363 N.E. 2d 218, 219.

Thus, we do not here decide the question of the applicability of 18 U.S.C. §2515 (1970), to the use of wiretap evidence on the substantive merits of the child custody question, because it is apparent that this question is not properly before us in this case. In the final analysis, this court must be the judge of its constitutional jurisdiction, and this jurisdiction, as embodied in the Constitution of Indiana by the people themselves acting in a sovereign capacity, is entitled to strict construction. *Warren v. Indiana Telephone Co.,* (1940) 217 Ind. 93, 26 N.E. 2d 399, *construing* Ind. Const. art. 7. Whatever the resolution of the question concerning the general scope of §2515, we do note that the harmless error doctrine has been applied to the admission of illegal wiretap evidence in the case of *United States v. Quintana,* (7th Cir. 1975) 508 F. 2d 867. There, the court stated that wiretaps, in violation of the same federal statutory scheme that is in issue in this action, were "merely cumulative to the great weight of other evidence" and "did not affect the substantial rights of the

parties." *Id.*, at 873. Their admission was thus harmless beyond a reasonable doubt under the concept of *Chapman v. California,* (1967) 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705. The same assessment was made by the trial judge in this proceeding, and we decline to engage in any presumptions concerning that judge's bias or prejudice based solely on the fact that he heard the tapes. The harm arising from evidentiary error is lessened substantially when the trial is by the court sitting without a jury. *See generally Shira v. State,* (1918) 187 Ind. 441, 119 N.E. 833; *King v. State,* (1973) 155 Ind. App. 361, 292 N.E. 2d 843. Without a transcription of these tapes before us to demonstrate their supposed prejudice, the presumptions in favor of the trial court's judgment apply in full force, and we must agree, in light of all the circumstances of this case, that the error, if any, in his hearing of the tapes was harmless beyond a reasonable doubt.

Four other questions need to be discussed here. Because of its disposition of this case on the issue of wiretap admission, the Court of Appeals did not reach two other arguments of Mrs. Lopp, alleging abuse of discretion in both the trial court's grant of permanent custody and its division of marital property. To a great extent, these arguments depend on the assumption that the trial court was unduly prejudiced by listening to the tapes, which assumption we have rejected. The remainder of these arguments, essentially, are a reargument of the conflicting evidence in this case and the relative weight to be accorded it. We have reviewed these arguments, and find that the evidence, while conflicting, is of enough substance to support the judgment of the trial court on the questions of custody and property division. We also agree with the Court of Appeals' disposition of the two other evidentiary issues in this case: that the admission of a deposition of wife's paramour was erroneous, but harmless since the deposition was merely cumulative, and; that there is sufficient evidence to support the trial court's finding on the issue of the wife's voluntary assent to the provisional custody orders. *Lopp, supra,* 370 N.E. 2d at 982-83. We fail to see how any further evidentiary hearings in this matter could lead to other results, or be in the best interest of the parties' minor child.

Transfer is granted, and the decision of the Court of Appeals in this case is vacated. The judgment of the trial court is affirmed in all respects.

GIVAN, C.J., HUNTER, PRENTICE, JJ. CONCUR.

DeBRULER, J. DISSENTS.